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ENDANGERED SPECIES ACT—INCENTIVES TO ENCOURAGE CONSERVATION BY PRIVATE LANDOWNERS

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Endangered Species Act - Incentives...

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SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

ENDANGERED SPECIES ACT—INCENTIVES TO ENCOURAGE CONSERVATION BY PRIVATE LANDOWNERS

OCTOBER 13, 1993

Serial No. 103–65

Printed for the use of the Committee on Merchant Marine and Fisheries

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ENDANGERED SPECIES ACT—INCENTIVES TO ENCOURAGE CONSERVATION BY PRIVATE LANDOWNERS

WEDNESDAY, OCTOBER 13, 1993

House of Representatives, Subcommittee on Environment and Natural Resources, Committee on Merchant Marine and Fisheries,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:00 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the Subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Pallone, Laughlin, Unsoeld, Reed, Furse, Lambert, Tauzin, Barlow, Saxton, Weldon, Ravenel, Gilchrest, Castle, Taylor of North Carolina, and Fields (ex officio).

Staff Present: Gina DeFerrari, Professional Staff; Marvadell Zeeb, Legislative Clerk; Sue Waldron, Press Secretary; Harry Burroughs, Minority Staff Director; Cynthia Wilkinson, Chief Minority Counsel; Laurel Bryant, Minority Professional Staff; Margherita Woods, Staff Assistant; Tom Melius, Minority Professional Staff; and Lesli Gray, Research Assistant.

STATEMENT OF HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. Studds. The Subcommittee will come to order.

We meet this morning to discuss how private landowners can be given incentives to conserve endangered and threatened species that occur on their property, and to improve habitat for these listed species.

As everyone knows, these critters don't care much about property lines and questions of private property are, to put it mildly, on the minds of a great many Members of Congress. In fact, a near-riot was staged last week on the Floor during the debate of National Biological Survey, of all things. So to the extent that anyone can offer us constructive ideas dealing with this problem, they will have made a major contribution to our efforts to extend the Endangered Species Act itself.

We have a series of folks we are going to hear this morning who have a variety of backgrounds and a variety of ideas. We are going to hear you as a single panel before proceeding to questions. And it is my understanding you have all been informed of the totality of our rules and the lights there. We are going to ask you to confine your oral presentation to no more than five minutes. Your written remarks will appear in their entirety in the record.

We will take you in the order in which you appear here. When the yellow light goes on, you have one minute left. When the red light goes on, you are done.

We apologize for that, but if it is any consolation to you, we submit ourselves to the same regimen.

[The statement of Mr. Studds follows:]

Statement of Hon. Gerry E. Studds, a U.S. Representative from Massachusetts, and Chairman, Subcommittee on Environment and Natural Resources

Endangered and threatened species do not recognize property boundaries—they occur on public lands and private lands alike. Private property accounts for 60% of the land base in this country; and its importance to our efforts to protect endangered and threatened species is underscored by the fact that half of these species are found exclusively on private lands.

Unfortunately, and ironically, the protections afforded to listed species under the Endangered Species Act can have the effect of discouraging species conservation and habitat protection on private lands. Concerns that the presence of listed species will make land use more complex, more time consuming, and more costly, can motivate landowners to ensure that listed species aren't attracted to their property.

If we are going to be successful in bringing listed species back to health—which is the ultimate goal of the Endangered Species Act—we will clearly have to enlist the help of private landowners. We need to amend the Act to incorporate positive conservation incentives. We want to reward those who go beyond minimal compliance with the law: people who take steps to make their property attractive for listed species and become actively involved in the recovery of those species.

Last week's floor debate on the National Biological Survey highlighted the sensitivity and magnitude of the issue of private property rights. Endangered species conservation and private property protection are not incompatible goals. We simply need better tools to get the job done. And it is a job that must be done. I believe, as I emphasized when I introduced legislation to reauthorize the ESA, that conservation on private lands remains our greatest challenge.

We have a panel of witnesses who have very thoughtful ideas on incentives, as well as witnesses from the timber industry and agricultural sector who hopefully will have suggestions on incentives from the landowner's perspective.

We will begin with Hank Fisher of Defenders of Wildlife, who has for the past several months been soliciting and compiling ideas about incentives from a variety of sources.

Any opening statements of members?

Go ahead. OK.

Does the gentlewoman from Washington?

STATEMENT OF HON. JOLENE UNSOELD, A U.S. REPRESENTATIVE FROM WASHINGTON

Mrs. Unsoeld. Thank you, Mr. Chairman, you're nice to indulge me.

Mr. Studds. It is Wednesday.

Mrs. Unsoeld. Providing private landowners incentives to conserve threatened and endangered species is a timely and appropriate topic to those of us who have been working to resolve the resource management crisis in the northwest. Nearly two-thirds of our logs are cut from private lands, and nearly half of those come from small, nonindustrial, private wood lots.

These lands have the greatest unmet potential for timber production, yet most of the timber is exported without processing and there is little, if any, incentive to manage these lands for maximum, long-term timber production in an environmentally sustainable manner.

But helping these landowners is about more than incentives. It is also about eliminating the disincentives.

For example, the IRS computes the estate taxes for small tree farmers at time of death on a stepped-up cost basis. In many cases, the estate taxes are so high the heirs are forced to sell. If the timber is half grown, selling the entire farm is often the only option.

If the timber is nearly grown and marketable, then hastily cutting it down is a way to cover taxes. I hope to have a legislative package by the end of this session and look forward to hearing our witnesses today discuss how they would encourage conservation by private landowners.

Thank you, Mr. Chairman.

Mr. STUDDS. The gentlewoman from Oregon.

STATEMENT OF HON. ELIZABETH FURSE, A U.S. REPRESENTATIVE FROM OREGON

Ms. FURSE. Thank you, Mr. Chairman, I will be brief and submit my remarks.

I do want to point out that as the Federal Government is trying to put its house in order, I think it is very important that we be understanding and supportive of private landowners trying to do the right thing to protect the natural biodiversity of their properties. It is important that we recognize the fundamental differences between citizen landowners and government landowners: Citizens have neither the resources nor the mandate for species protection held by the government, so it is paramount that we be creative and innovative in pursuing different options to encourage and reward private land stewardship.

I really look forward to the testimony today and I am so pleased that private landowners are coming forward with ideas of how we can in fact protect those precious natural resources.

Thank you, Mr. Chairman.

Mr. STUDDS. The gentleman from Pennsylvania.

STATEMENT OF HON. CURT WELDON, A U.S. REPRESENTATIVE FROM PENNSYLVANIA

Mr. WELDON. Thank you, Mr. Chairman.

I first of all ask unanimous consent to submit the statement of Congressman Saxton, who could not be with us at the beginning.

[The statement of Mr. Saxton follows:]

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

I want to thank the Chairman for calling this hearing today so that we can carefully examine the Endangered Species Act and its unintended incentives against good stewardship by private land owners.

Government has proven, in most instances, to be a dismal steward of our natural resources—be it fish, timber or grazing lands, the perverse incentives provided by government have often laid waste to these resources.

Not until we begin rewarding good behavior and stop blindly penalizing private landowners whose economic livelihoods are tied to the stewardship of their lands, will the management of our nation's resources fulfill the intended goals of our laws.

I look forward to hearing from today's witnesses and the open mindedness with which they have approached this problem. I hope this hearing is only the beginning of a dialogue to carefully scrutinize our natural resource laws and the negative incentives which have often resulted in sabotaging their intended goals.

Thank you.

Mr. WELDON. Mr. Chairman, I would like to congratulate you and the Subcommittee Ranking Republican for holding this hearing on finding ways to encourage private landowners to conserve endangered and threatened species. As a strong supporter of the Endangered Species Act and the wildlife habitat which it protects, I am concerned about the paradox that the act has created with respect to private lands. Over 60 percent of the U.S. land base is private property. Much of our Nation's most productive wildlife habitat has been nurtured and conserved by conscientious landowners who have often spent considerable time, energy, and resources to maintain their properties in a manner which preserves its natural integrity.

It is these landowners, though, which must now bear the brunt of the cost of ESA. The situation is fundamentally unfair. It also creates a significant disincentive for landowners to pursue land management techniques which create or conserve wildlife habitat.

Why would a landowner create or preserve habitat for a listed species when Federal land use restrictions might be imposed once the species takes up residence on his or her land? I believe that the ESA cannot accomplish the goal of species preservation without the voluntary cooperation of private landowners.

We, therefore, must try and create incentives, not disincentives, for the preservation of privately-held habitat.

Today's distinguished witnesses have proposed a range of creative solutions to the problem. I am hopeful their insights will provide the Subcommittee with a foundation for addressing this important issue.

Again, I want to congratulate Chairman Studds and Congressman Saxton for their leadership in holding this hearing. It is another important step in the long road to reauthorizing the ESA.

Mr. STUDDS. The gentleman from Rhode Island.

STATEMENT OF HON. JACK REED, A U.S. REPRESENTATIVE FROM RHODE ISLAND

Mr. REED. Mr. Chairman, I just want to welcome the witnesses and I look forward to the testimony; and thank you for calling this hearing.

Mr. STUDDS. North Carolina.

Mr. TAYLOR. I will yield to the gentleman from South Carolina.

Mr. STUDDS. The gentleman from South Carolina.

The gentleman from North Carolina.

STATEMENT OF HON. CHARLES H. TAYLOR, A U.S. REPRESENTATIVE FROM NORTH CAROLINA

Mr. TAYLOR. I appreciate the fact that we are having this debate and I appreciate the chairman's sensitivity towards this issue. It is not something that we need to spend a lot of time on and anguish about in the sense that there are some great sacrifices or complications here.

We need to look at the intent of the Framers of the Constitution and the Bill of Rights, who were very much interested in protection of private property as one of the essential rights in a free nation. It is what distinguishes us from the socialistic, communistic oligarchies in the east that have failed so miserably.

In fact, it probably is the one thing that will bring about salvation in Russia. They need a parliament that will come in and recognize private property rights and the people's ability to own property and build assets for themselves and their families so that they can support freedom.

In this country with our great movement toward central planning that seems to be in vogue, we cannot forget about the Fifth Amendment. We cannot forget about that amendment or we risk losing all the others. And that is why focusing on private property, we, all of us in Congress, should be its champion. We should not be looking for ways to get around what is clearly a taking and calling it something else; but in fact, we must say that if there are essential national needs here as far as biological diversity or protecting ecosystems of various critters, then the government must have a policy where it compensates when property rights are taken.

And we weigh that compensation against the merits of the policy we are trying to put forward. I think it is relatively simple if we keep in mind that private property should be sacrosanct. That right should be sacrosanct as a fundamental right, going back over the 200 years of this Nation's history.

And if we follow that path, then I think we can move ahead and save those essential areas of the environment that we need to and at the same time not abuse the private property owner.

Thank you, Mr. Chairman.

Mr. STUDDS. Thank the gentleman.

The gentleman from Rhode Island.

Mr. REED. Mr. Chairman, I was too hasty in welcoming all of the witnesses, because on closer inspection I notice one of them is my former classmate from law school, Jim Kraft, so I'll have to wait until his testimony is over until I really make my true feelings known.

Mr. STUDDS. Always read these very carefully.

Mr. RAVENEL. Mr. Chairman.

Mr. STUDDS. Gentleman from South Carolina.

Mr. RAVENEL. I would ask unanimous consent to put Mr. Fields' opening statement in the record.

Mr. STUDDS. Without objection.

[The statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, I am pleased to be here today at this hearing to explore various ways to encourage the conservation and protection of species and habitat by private citizens.

I am deeply committed to protecting our endangered and threatened species, and the Federal Government, through the Endangered Species Act, is doing much to achieve this goal. However, I do not believe that Government can do it alone. We need, and should have, the cooperation of private landowners across the country. Unfortunately, the Endangered Species Act frightens a lot of people. So, in essence, we have two goals—to make the Act less burdensome and to give private landowners positive incentives to help us save endangered plants and animals.

The various controversies surrounding private property rights and species conservation are particularly evident in my home State of Texas, where 367 listed and candidate species exist and where 98.1 percent of the land, much of it rural, is in private hands. This is why I have worked to address private landowner concerns in H.R. 1490, the Endangered Species Act Procedural Reform Amendments of 1993, introduced by Mr. Tauzin and myself.

Some people have accused us of trying to dismantle the Act, others say we are using scare tactics to weaken it. The truth is, we became involved in this issue because our constituents are scared. Many people have firsthand bad experiences with the Act and others see their neighbors shackled by the red-cockaded woodpecker and the golden-cheeked warbler. Instead of working with the Federal Government to preserve habitat and species, many landowners are shying away from any involvement with any Federal official, the Act, and anything connected with them. And their fears are not unfounded.

Let me give you an example of what I am talking about. A constituent of our colleague, Congressman Coble, recently lost more than $1,800,000 because the red-cockaded woodpecker was found on his property. This property owner had followed good management practices on his timber lands rather than clear cutting. He now has 1,650 acres of prime mature timber he cannot cut because that happens to be the woodpeckers' foraging habitat. As a result of this loss, he has changed his practices and is clear cutting the rest of his acreage in order to keep the bird from wandering onto the rest of his property.

We should be rewarding this man for his good practices, not punishing him.Similar horror stories are occurring around the country. In Texas, the red-cockaded woodpecker, the black-capped vireo, and the golden-cheeked warbler have drastically depressed land values; in Florida, the scrub jay has complicated management decisions of landowners and citrus growers; and in the Northwest, the spotted owl listing has affected not only the timber industry, but entire communities.

The time has come to replace the disincentives and the rigidity of the Act with incentives and flexibility to ensure the cooperation of private property owners. Without them, we may be fighting a losing battle in our attempts to preserve endangered and threatened species. That is why H.R. 1490 provides for a consultation process for the private individual, cooperative management agreements, multiple species conservation plans, cost sharing, habitat conservation grants, and compensation for substantial loss of economic value of private property.

A property owner must have some certainty in determining what he can and cannot do on his property without jeopardizing a species or its habitat, a right currently afforded to Federal agencies. Cooperative management agreements and multiple species conservation plans would allow the property owner a more efficient and less costly way to work with the Secretary to preserve species and habitat. Conservation grants and cost sharing would provide much needed financial assistance to those who wish to cooperate. And, lastly, compensation would eliminate the massive burden that currently hangs over the heads of private property owners under the current Act.

I look forward to hearing from our witnesses today, especially Dr. McKinney, with the Texas Parks and Wildlife Department, and Mr. Meister, with the Texas Farm Bureau. I understand that both of these gentlemen will address the need for assistance and incentives for the landowner to cooperate with the successful implementation of the Endangered Species Act.

Mr. Chairman, I commend you for holding this hearing and am anxious to work with you to provide for such incentives to private landowners in the reauthorization of the Act.

Thank you, Mr. Chairman.

[The statement of Ms. Eshoo follows:]

Statement of Hon. Anna Eshoo, a U.S. Representative from California

I would like to thank the Chairman for holding this hearing today.

The competing demands for our natural resources will only get worse as our nation strives to remain competitive while preserving them. The Endangered Species Act is a critical piece of legislation, but clearly, some adjustments need to be made to improve its enforcement and to encourage conservation—particularly on private lands, which contain 50 percent of the 728 species listed under the Act.

I agree with Secretary of Interior Babbitt that policies are needed to prevent disastrous "trainwrecks" such as that occurring in the Pacific Northwest. And I believe that the Biological Survey Act, which is currently pending before the House, will help us achieve this goal. However, thousands of "smaller trainwrecks" occur every year, affecting private landowners and the endangered species that call their land home.

It is important for us to find incentives for private landowners to practice conservation on their property. Failure to deal with this issue will only result in the continuation of costly court battles and lost opportunities to save our endangered species.I11For these reasons I commend our esteemed Chairman for holding this hearing. This is not an easy issue, but I look forward to beginning a dialogue so that we can put these conflicts behind us.

Mr. STUDDS. Now you have heard from us, we are going to hear from you. We will go down, as I said, in the order in which you appear here, starting with Hank Fischer, speaking for the Defenders of Wildlife.

STATEMENT OF HANK FISCHER, NORTHERN ROCKIES REPRESENTATIVE, DEFENDERS OF WILDLIFE

Mr. FISCHER. Thank you. Mr. Chairman, and members of the Committee, I am very happy to travel here from Montana to share some thoughts with you about the Endangered Species Act.

My name is Hank Fischer. I work for Defenders of Wildlife and I have run our Northern Rockies office for 16 years. I have a lot of experience working with some really contentious endangered species issues including grizzly bears, wolves, slack-footed ferrets, and I would like to share some of that experience with you.

In my 16 years, we have employed most of the standard regulatory approaches to protecting endangered species. We have commented on listings, we have been involved with recovery plans. We have been involved with urging agencies to implement those recovery plans, and when they haven't we have sometimes engaged in legal action.

But on balance, the point I want to make very strongly is the Endangered Species Act has worked well on public lands. The problems we hear about are the exceptions rather than the rule.

Of the 74,000 endangered species consultations conducted over the last 5 years, only 19 have resulted in actually stopping development. Day in and day out, the Endangered Species Act does one thing very well. It makes development compatible with protection of species, and that is important.

A lot of people complain that it stops too much development. Some people complain it stops too little. I think it has struck a good balance of making development compatible with species recovery.

At the same time, the Endangered Species Act has clearly worked less well on private lands. And in that respect, I think we can see some of the limits of strictly a regulatory approach to implementing the law. It has been my experience that our basic conflict, and I guess it is true in my part of the world, I assume it is true everywhere, that this whole notion of the sanctity of private property rights is a belief that is held just as deeply as the belief that we should protect all species from extinction.

And so we are working with those two very important principles. At the same time, our experience with private lands in the northern Rockies isn't so much that we have an oppressive Federal Government telling private landowners what to do with their land. My experience is I don't know of any specific circumstances in the northern Rockies where private landowners have been significantly disadvantaged because of implementation of the Endangered Species Act.

The broader concern is that the Endangered Species Act simply isn't addressing private lands very effectively. The agencies are, in my experience, very timid about attempting to have Endangered Species Act implemented on private lands. I think they recognize there is a tension here between private lands and private property rights.

At the same time, we have to address this private property problem because fully 50 percent of our 728 listed species are found exclusively on private lands. Another 20 percent are found at least half the time on private lands. So if we don't deal with the private lands problem, we won't be successful with preventing extinction.

Our organization has experimented with incentives significantly over the last 10 years. We established a fund to compensate livestock producers for livestock losses to wolves in the northern Rockies. We implemented that in 1987.

Since that time, we have paid about $12,000 to about a dozen different livestock producers. We have paid for every circumstance of livestock loss in the northern Rockies. We think it has reduced polarization. We think it has enhanced cooperation.

Another program, I guess we had enough success with this compensation program and received enough positive reinforcement that we tried to figure out a way to make endangered species an asset for private landowners rather than a liability. And we developed what we call a Wolf Reward Fund, where we pay private landowners $5,000 if they successfully have wild wolves reproduce on their private lands and raise the pups to adulthood.

And we have also just recently published this work on building economic incentives into the Endangered Species Act. I think you have all seen that. One thing that I think will be apparent from anybody who reads this publication is that it isn't a scarcity of good ideas that is preventing us from using economic incentives. There are a lot of them out there.

The problem is that the Endangered Species Act does not contain a process that provides for experimentation with building economic incentives into the law. There are a lot of good ideas but they are unproven, they are untried, and we need a method so we could attempt to assess whether these things work or not.

We need a way to experiment with it, not dissimilar from the way that an experimental population provision was created in the law in 1982. We could create what could be called economic incentive zones. These zones would be created in instances specifically where we have conflicts with private property owners.

I would be quick to say in most cases I do not think that—I think that our experience with private property and endangered species management will mimic what we have seen on public lands. In most instances, changes in management at a fairly minor level is all that is necessary to accommodate endangered species. But you are always going to have handful of problems that are very difficult, hard to deal with, and in that case having a provision that would allow us to use economic incentives to experiment with economic incentives, would be a real major benefit. And what——

Mr. STUDDS. I hate to do this to you, but if you could wrap up.

Mr. FISCHER. I will call it good enough.

Mr. STUDDS. Sorry about that. It is the only way we can get through.

Let me say, if there are any of you who can't find seats, especially those of you who need to write, please feel free to fill in around the lower level here.

[The statement of Mr. Fischer can be found at the end of the hearing.]

We will go next to Mr. Larry McKinney from the Texas Parks and Wildlife Department. Mr. McKinney.

STATEMENT OF LARRY McKINNEY, DIRECTOR, RESOURCE PROTECTION, TEXAS PARKS AND WILDLIFE DEPARTMENT

Mr. MCKINNEY. Mr. Chairman, I am Larry McKinney from Texas Parks and Wildlife in Austin, Texas. I appreciate the opportunity to address the Committee on the important issue of incentives for private landowners. While the debate about relative merits of many provisions of the act, both existing and proposed, have been divisive, I found almost universal support for the need to amend the act to provide private landowners, and more specifically rural agricultural landowners, a better means of complying with it.

Texas is perhaps the most vivid example of what is at stake. Because of its unique location and size, Texas is blessed with an abundant and diverse community of plants and animals, many of them found nowhere else in the world. Texas is also a State dominated by private ownership of land, and as a result over 95 percent of that habitat base, a base upon which our State's biodiversity is centered, depends on those landowners to conserve and protect for the future.

While Texas may be unique in the extent of private ownership of land among western States, it is not singular. Private ownership of lands in these States averages 50 percent. In addition, more than half of all the listed species are found on private lands, and of those, three-quarters are predominantly found on those lands.

The vast majority of those lands are farms and ranches and as a result of the responsibility for meeting the requirements of the act have fallen directly upon those for whom agriculture provides a livelihood. That burden has been generally unrelieved by existing provisions of the act and any reauthorization must address two basic areas: increased technical assistance and incentives to correct that failing.

It is clear that there must be positive incentives and simple procedures to increase the participation of rural landowners in protecting endangered species. Currently, good land management practices that result in creation of habitat is understandably considered a liability by many landowners.

While I have no hard evidence to prove it, I am convinced that more habitat for listed birds like the black-capped vireo and golden-cheeked warbler has been lost in Texas since their listing than would have been lost without the act.

Incentives to assist rural landowners fall into two main categories: tax reforms and farm programs.

Tax incentives, both income and inheritance, should be provided for landowners to not only maintain existing large habitat blocks for endangered species, but to actively manage for, and create such habitat.

Changes in farm programs could allow for both the opportunity and funds to conserve habitat. The Conservation Reserve Program is one example where the creation or restoration of such habitat could be given priority consideration while still meeting the original goals of that program and without additional cost.

Because these incentives would require considerable Federal funding or tax reform, it will be difficult to gain support for them. Nonetheless, they represent the best and most effective if the incentive options that I have seen.

Another approach I would recommend is not dependent on such funds or reforms and while the financial burden remains with the landowner it provides a mechanism of which they have greater control over actions on lands that have endangered species habitat and allows them to work cooperatively on a local level, and with minimal Federal oversight. It also expands the technical assistance role of State agencies. I have called them "cooperative conservation plans" or CCPs, and they are modeled on the existing habitat conservation plans provided for in section 10 of the act.

CCPs would allow agricultural landowners with contiguous or nearly contiguous properties to form cooperatives to accomplish the same goals as provided by a habitat conservation plan, but without the EIS requirements and similarly complex and expensive technical requirements of those plans. Such requirements would not be necessary for CCPs as little land use change would be contemplated due to their nature. That minimal level of land use change would be a key requisite for approval of such plans. CCPs would operate more in the form of a wildlife management cooperative, a concept that has shown to be an increasingly accepted and successful means of pooling landowner resources.

Ideally, CCPs would provide more direct landowner control, priority access to Federal programs, allow for flexibility in meeting the needs of agricultural operations, as well as potential income generation, but without the compromising biological constraints necessary to meet conservation goals of the act. If successful, an increasing number of functional CCPs operating within close proximity of one another would begin to approach management closer to the ecosystem scale that is necessary if the act is to move forward and be ultimately successful.

The implementation of CCPs will require allowance in the act for some risk-taking and experimentation, and the possibility of failure, as does any shift away from a existing paradigm. The reward for success is conservation of endangered species over millions of acres where it is not now happening. My assessment of the current situation leads me to believe that we have little to lose and much to gain.

In fact, I believe we have little choice. Rural landowners and the habitat for which they are stewards have a critical role to play in conserving this Nation's biodiversity. Without them we cannot possibly succeed in meeting the goals of the Endangered Species Act.

Mr. Chairman, I appreciate the opportunity to make these remarks and will be happy to answer questions at the end of the presentations.

[The statement of Mr. McKinney can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir.

Our next witness, Dr. Mark Shaffer of The Wilderness Society. Mr. Shaffer.

STATEMENT OF MARK L. SHAFFER, VICE PRESIDENT, RESOURCE PLANNING AND ECONOMICS, THE WILDERNESS SOCIETY

Mr. SHAFFER. Thank you, Mr. Chairman, and members of the Committee, for the opportunity to be here today.

First of all, why are we considering incentives? The Framers of the Constitution not only left with us very strong concepts of the protection of individual property rights, they also left with us the concept of our wildlife as a public trust resource. And the problem we are confronting today in the United States is that that public trust resource for which the Government has stewardship responsibilities now depends on a landscape that is 70 percent privately owned.

Because biodiversity's values are not currently expressed in financial terms, the principal means that we use in this country to make resource allocation decisions, the free market, cannot allocate land efficiently to maintain biological diversity because it can't sense its values.

So in a very real sense, endangered species and the loss of biodiversity represent a market failure. Now we have had those before in the United States on public policy issues, and there is a variety of ways in which the Government can respond to provide those sorts of common goods like biodiversity that the market fails to.

And there are four basic approaches: one is regulation; one is through incentives; one is through disincentives; and the other is through creation of markets and the development of ownership rights. Well, if you look at the history of the Endangered Species Act, to date the Wilderness Society is a strong supporter of the act. We think it is absolutely essential.

But I think you also have to look at the facts and figures. Maybe one in four species that need protection under the act are currently listed; about half the species that have been listed have recovery plans. We have had critical habitat determination for very few species. So the impression is that we have got a good law that is not living up to the challenge.

And we think that there is great potential for looking at market mechanisms and financial incentives to help the law meet the challenge and do a better job. Now, we participated in Defenders of Wildlife's report and we have attached to my testimony today a copy of our paper, and I will just very quickly point out seven ideas that we want to raise.

These are not things that we are recommending for instantaneous adoption. One would be a Federal tax credit for local property taxes on qualifying habitat. Another would be Federal tax credits for habitat improvement. Another would be partial Federal tax credits for compliance with the ESAs. Another would be income tax deductions for management of lands that produce income, but still allow the maintenance of endangered species on that land.

We have also suggested a few disincentives. These mechanisms work best if there is a little bit of a good signal as well as a bad signal. And we think you could or should consider a Federal tax penalty for conversion of very scarce types of endangered species habitat.

You might also want to consider the prohibition of existing tax benefits and other Federal subsidies for those types of activities that produce endangered species. And finally, we think there can be a role potentially, certainly should be examined, in creating a market for development rights in different types of habitat that are important.

I don't want to go into the details of these here today. They are contained in the written testimony. But I want to emphasize about four points.

First, we are not recommending any of these options for adoption. Rather, we support the provisions in H.R. 2043 and S. 912 which would require the Government to do a very thorough study of this entire issue. And we think that is a very important provision of both of those bills.

Second, most of our ideas relate to the Federal tax code and we think that the Federal tax code is going to have to be a major vehicle for providing incentives to private landowners for maintaining habitat for a variety of reasons.

Third, we don't think there is going to be a single magic bullet here, and that is another reason to have a very thorough and deliberate study. We think we are going to have to have a system of incentives and disincentives to really get a handle on this problem.

Fourth and finally, in terms of a general comment, we need to be prepared when we have done this study to find out that economics tells us that the role for incentives is in preventing things from ever becoming endangered, and is not very useful once they are critically endangered and there is no leeway to create a market because you can't afford to lose any more habitat.

Finally, I would just like to say don't miss the opportunity in this study, and in consideration of the ESA, to examine current incentives that are producing endangered species. A forthcoming wilderness society report finds that fully 60 percent of currently listed species are on the list, at least in part, due to such activities as water development, grazing, mining, et cetera. A lot of those activities are subsidized heavily on public lands and we would suggest that there is a great opportunity here to save taxpayers' money and stop producing endangered species through prudent reform of existing resource subsidies.

In fact, we think that is so important that we would encourage you to consider having hearings on that aspect of incentives in the Endangered Species Act.

Thank you very much.

[The statement of Mr. Shaffer can be found at the end of the hearing.]

Mr. STUDDS. Thank you, sir. Next, Mr. Robert Thornton, an attorney from Irvine, California.

Mr. Thornton.

STATEMENT OF ROBERT D. THORNTON, ESQUIRE, PARTNER, NOSSAMAN, GUTHNER, KNOX AND ELLIOTT

Mr. THORNTON. Mr. Chairman, it is a pleasure to be here. I am an attorney in private practice who for the last 13 years has represented a variety of landowners, developers, local and regional agencies on endangered species and other issues. A number of witnesses have spoken about the challenge because of the significant extent of endangered species on private property.

I have included in my testimony excerpts from the California Natural Diversity Data Base, which I think very graphically describes the problem, or as Dr. Shaffer indicated, the challenge that we have.

This represents the occurrence of endangered and threatened mammals in the State of California. This is the occurrence of endangered and threatened birds. And these are the plant species.

These maps don't include the invertebrates, including the several butterfly species that are listed in California. Nor do they show the Delphi fly, one of the invertebrates recently listed, or reptiles such as the desert tortoise. So, as those maps illustrate, there is a tremendous impact on private property out there.

Since the enactment of the Habitat Conservation Plan Provisions in 1982, there has been significant rhetoric about model and collaborative planning efforts between private landowners and the Government. I would submit that the reality is not keeping pace with the rhetoric, because very, very few plans have been approved, although there are a number in the pipeline. Why is that?

One of the major problems is with regard to these very large multiple landowner plans that are under development, and there are a number of those in California. Just to give you one example, the plan that is attempting to address the issues of the California gnatcatcher and other coastal sage scrub species effects about 250,000 acres of private land, out of a total base, habitat base, of about 575,000 acres.

The traditional approach of the HCPs of drawing a line on the map and identifying preservation zones and development zones works OK if you have very large landowners who are able to move their resource development activities around. It does not work where you have thousands of private landowners, as we have in California, effected in some of these HCP efforts.

To give one example, the plan that addresses the Stephens' kangaroo rat affects about 80,000 acres of private land. There are thousands of landowners effected. Frankly, many of them are very opposed to the HCP because they don't see any benefits from it.

One of the ideas that has developed, and it is described in more detail in my testimony in the paper, in California that I think is quite intriguing, is the notion of a transaction method or creating tradable habitat credits for landowners to unlock the efficiency and creativity of the marketplace to provide for the conservation and endangered and threatened species habitat.

This would work by having landowners obtain conservation credits by preserving or enhancing habitat and then selling those credits to developers as mitigation for impacts in wildlife habitat or for using those credits themselves. In this form, this idea is really no different than the notion of tradable emissions that has developed under the Clean Air Act.

But there is a difference between air and habitat. Air is relatively fungible, habitat is not. All habitat is not created equal. Therefore, any system that is developed, has to address this issue. We think that can be done. It is described in the paper.

The essence of the idea is to adjust the value of the credits depending on the activity that is going on around the landowner's property, so that you create an incentive for multiple landowners to cooperate with each other to enhance the value of their property or enhance the habitat quality value of that property and to therefore increase or enhance the property's economic value.

So what can Congress do? In my view, it is absolutely essential that the act be amended to authorize prelisting permits or to authorize permits for unlisted species. This was the intent of Congress in the 1982 amendments, but the act has been interpreted by the Fish and Wildlife Service not to allow prelisting permits for endangered species.

These market-based systems can't work if we have gnatcatcher credits and kangaroo rat credits and cactus wren credits and whiptail lizards. We have to have habitat credits. We have to have a statute that recognizes that you have to deal with these issues on a habitat basis and allow landowners to realize economic value from their property in doing so.

Thank you very much, Mr. Chairman.

[The statement of Mr. Thornton can be found at the end of the hearing.]

Mr. Studds. Thank you so very, very much.

Next, Mr. Jim Kraft of the Plum Creek Timber Company in Seattle.

Mr. Kraft.

STATEMENT OF JAMES A. KRAFT, VICE PRESIDENT, LAW AND CORPORATE AFFAIRS, PLUM CREEK TIMBER COMPANY

Mr. Kraft. Thank you, Mr. Chairman.

My name is James Kraft. I am Vice President of Law and Corporate Affairs, Plum Creek Timber Company.

I want to thank the Subcommittee for the opportunity to testify today on how economic incentives can be used to encourage landowners to conserve——

Mr. Studds. Can you pull that mike just a little bit closer, please? Thanks.

Mr. Kraft [continuing]. to conserve endangered and threatened species in their habitat on private property. This subject is especially timely because the Endangered Species Act is not working well either for listed species or private landowners.

If we wish to have a law that truly encourages the conservation of species that also respects the economic role of private lands, then the Act needs to be changed. Specifically, the act should be amended to provide mechanisms for the conservation of listed species in lieu of current regulations that mandate the set-aside of private land without compensation.

Because of time constraints, I don't want to go into too many details. It is contained in my testimony, but I will simply describe some of the ideas that could be used for further consideration.

First, the act needs to have a mechanism that encourages timely land exchanges. The act has a provision for acquisition of land but that has been underused and underfunded. Today, land exchanges are difficult if not impossible to do.

For example, Plum Creek had two exchanges in environmentally sensitive areas of the Cascade crest in the State of Washington, both of which had been underway for several years, only to have the spotted owl listed and have the Forest Service cancel the exchanges. Even where we have been able to accomplish exchanges, our history has been that they take on average about seven years to accomplish.

If it is determined that the role of the Forest Service is to provide environmental benefits in the context of multiple use, then we need to reemphasize land exchanges. For example, Plum Creek owns substantial acreage intermingled with that of the Forest Service in areas in the State of Washington which under President Clinton's Option 9 have been designated as preserves for spotted owls where no management or little management is to occur. Because that type of a management regime isn't appropriate for private lands, they would be prime candidates for exchanges. The act should be changed to provide that exchanges could be part of the Habitat Conservation Planning process.

Currently, if we were to do an HCP, land exchanges couldn't be part of that. If they were made one process, then both could be made simpler.

A second mechanism that could be added to the act in addition to exchanges would be incentive mechanisms. We have heard many— and there have been some very good ideas I think in the papers that Mr. Fischer commissioned. While incentives can take many forms, any incentive should encourage practices that make operational and economic, as well as environmental sense.

Moreover, if the incentive is to be effective, it must offset the net cost of the desired practice so as to provide an acceptable rate of return. Without that kind of a return, then you are not going to have a successful incentive.

Finally, the funding of incentives should reflect both the broad public benefit of an improved environment as well as the long-term nature of the benefit. There are at least two types of incentives that come to mind. One would be tax incentives, whether they be deductions or credits, and the concept could be that you would provide different levels of incentives depending on the degree and the importance of the practice.

For example, you could create more incentives for those types of permanent types of conservation easements or other prescriptions, whether it be new forestry, in priority areas. That way you could mimic a market in a sense that landowners would have more incentive to do beneficial activities in those critical areas.

A second tax related or benefit could be the use of management contracts, which would delineate the private lands and the prescriptions involved. It would be akin to an expedited HCP.

With any incentive, funding is critical. And if we are going to have appropriate levels of incentives, then we need to have a mechanism. One idea that comes to mind is long-term tax-exempt environmental bonds.

That would both spread out the cost to the public to mimic the long-term nature of the benefit, and also provide incentives for people out there in the market who want to fund environmentally-correct activities.

With that, time is short, I would be happy to answer questions at the end.

Thank you.

[The statement of Mr. Kraft can be found at the end of the hearing.]

Mr. STUDDS. Thank you, sir.

And finally, Mr. Ned Meister, the Texas Farm Bureau. Mr. Meister.

STATEMENT OF NED MEISTER, DIRECTOR OF REGULATORY AFFAIRS, TEXAS FARM BUREAU

Mr. MEISTER. Mr. Chairman, members of the Committee, my name is Ned Meister. I am the Director of Regulatory Affairs for the Texas Farm Bureau in Waco, Texas.

Texas Farm Bureau is a general farm and ranch organization with producer members in all Texas counties. I appear before you today to offer possible solutions to the problem of the presence of endangered and threatened species on privately-owned farm and ranchland.

It is critical that we create a program of inducements to protect species rather than use heavy-handed mandated regulation. You and the Committee members should be congratulated on your efforts to find ways to provide incentives to individual landowners to preserve endangered species.

In my opinion, the current act provides almost no incentives, with only penalties for the interruption of any endangered species. History indicates that incentives will do far more to achieve our stated goal of preservation and propagation of endangered plants and animals.

Mr. Chairman, what I propose to your Committee today is a program which is similar to the Conservation Reserve Program, the CRP, operated by the U.S. Department of Agriculture since 1985. The purpose of that program was to protect and preserve highly erodible land.

I might add that the CRP has proven highly successful by enrolling farmers in this voluntary program. The Wetlands Reserve Program is another example of a voluntary program that illustrates farmers' willingness to participate in conservation efforts.

The critical habitat reserve program would consist of a five-year contract between the Department of Interior and the individual landowner. As proposed, the contract is subject to renewal as long as the species is threatened or endangered. We would propose that the program be voluntary, with producers submitting bids for the approval of their contract, just as currently practiced under CRP.

Where a threatened or endangered species could not survive without some type of action, our plan provides for a resolution process that we believe offers private landowners a better alternative than existing law. Under the proposed contract, landowners would be required to implement an approved recovery plan and restrict it from any unspecified use of the property.

Periodic inspections by appropriate officials would ensure compliance with the plan. Violation of plan agreements could not only result in forfeiture of benefits, but assessment of penalties as well. Our recommendation would be that these contracts call for the lease of property by the Federal Government, rather than an easement.

The more responsibility an individual landowner has, the better he or she can be expected to perform. Obviously, in addition to inspection visits, an oversight responsibility would be necessary. The USDA has a history of providing incentives to producers and hopefully any new program could be coordinated with that agency to best assure success.

However, I would assume that the final authority for the determinations would be with the Interior Department. Mr. Chairman, the American agriculturist has made this nation the breadbasket of the world, providing its citizens with the most abundant, safest, most inexpensive food supply in the world. With all due respect, if the Committee wishes to preserve a species, be it plant or animal, the American farmer and rancher with proper incentives can do it.

In the interests of time, I have already submitted the plan to the Committee and will be happy to answer questions; and I do thank you for having this hearing.

[The statement of Mr. Meister can be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir.

As I hear you all, there are a variety of ideas around the table, some have been tried in one form or another, in one place or another. Some are yet to be proven. I guess they are all yet really to be proven with the possible exception of the last gentleman from Texas.

As we look at the reauthorization of the fundamental statute, I guess it is clear that we are not going to just write into it an unproven idea, that this might or might not work. But I assume what we are being asked to contemplate is the possibility of building some flexibility into the statute so that a variety of these approaches can be supplied on an experimental basis to see what does and doesn't work for different kinds of critters and different kinds of settings.

Am I correct that that is the general thrust of what we are hearing, that we ought to allow the implementing agencies some real flexibility to try out potentially promising ideas?

Mr. THORNTON. I am sitting in the middle, Mr. Chairman. Maybe I will respond.

Certainly I think that would be very helpful, but I think the act needs to do more than that. I think it needs to actually promote these efforts. It has to really get out and promote them. That is really what the HCP provisions attempted to do in 1982.

And unless we can establish a system where we create some regulatory certainty for landowners, that encourages them to get into a planning process and to manage their property in a fashion that is compatible with endangered species conservation, it is not going to happen. There are tremendous disincentives in the statute right now as it is interpreted because what is in it for a landowner to go out and plan property that has multiple species, and make commitments to conservation, if he has to worry about subsequent species being listed in the future and not being protected by the plans that have been approved.

Mr. Studds. Anybody else want to speak to that?

Let me just observe that there is more than that at stake if we don't do this right. I think it is quite clear that unless we can satisfy the legitimate and rational concerns, and I underline legitimate and rational, and they are there, of those who are focused on the problems of private property rights, we are not going to be able to successfully sustain this act, period. So this is abundantly clear, I think, and everybody ought to recognize that.

And I think that gives a heightened urgency to the question before us at the moment.

Yes, sir, did you want to——

Mr. Fischer. One thing I was going to say is that I think a process that would work best would be a process whereby it is not just the Government designing these programs, it would be a process whereby private landowners could make a proposal, a conservation organization could make a proposal, a State government could make a proposal, and submit that to the Fish and Wildlife Service and have them review as to whether it is practical. And then again, have this ability to create an experimental economic incentive zone. And, again, I would emphasize that I think the applicant of these is more narrow in terms of I think we—we have a relatively small number of issues that are very hard to resolve.

And I think we need these extra sort of mechanisms to resolve those. I don't think it is really the norm, though, and the parallel I would make is with the experimental population provision of the law, which was designed to facilitate re-introduction of highly—of endangered and highly controversial, mainly large predators. And I think that that has worked and the experimental population provision has provided the flexibility that has taken some of the tension out of this debate.

Mr. Studds. I think you are correct, and I assume you are correct in that these kinds of extraordinary problems are not the norm, they are the exception. However, they are perceived broadly in the land and certainly by folks in this institution in many cases as being a major, major problem. That by definition makes it a major, major problem. And we have to address it. Yes.

Mr. Shaffer. Mr. Chairman, I think there is some room and would encourage that in this reauthorization we build in some provisions, experimental perhaps. But I do want to encourage very strongly the Committee to consider that even as we are experimental, let's not miss the opportunity to do some thorough analysis of all the kinds of efforts we have tried in this country before to influence land use.

I mean there is an entire collection of incentives that exist out there on the land right now, Conservation Reserve Program, the Forest Legacy Program, so I would encourage us to be flexible and to be experimental, but let's also be analytic, because I do think in the long run we are getting at issues that are going to require a very intelligent and perhaps very intricate policy with a number of provisions for it to be effective.

Mr. STUDDS. Yes, Mr. Kraft.

Mr. KRAFT. I would like to reemphasize the current law provides disincentives. On our land, we have probably half of the spotted owl sites that occur on private lands in the State of Washington. And prior to the owl's listing, we were doing experimental harvests that we thought both balanced economic needs as well as the environmental needs for the owl. Today we could not replicate those experiments, nor would we have any incentive to do so.

And so I think it is important, as we look at section 10 and the habitat conservation planning process, the need to put economic incentives in there now, because frankly it is very hard to justify expanding costs on things for which there is no return.

And if you look at the statistics in the State of Washington, forest practices application in the last year have doubled by many, many small landowners who fear the regulatory taking of their property. And if we are to avoid that and to align the economic self-interest of private landowners with the environmental interest, then we need incentives or I think we will ultimately fail.

Mr. STUDDS. That is the trick.

Mr. KRAFT. I think it is more than an experimental program; we need to work these options out.

Mr. STUDDS. Thank you.

Let me just advise members that the red light, the system of lights will apply to us. I am going to recognize members in accordance with our procedure here, in the order in which they arrived after the beginning of hearing, regardless of party. The only exceptions I am going to make are for the ranking member of the Subcommittee and the ranking member of the Full Committee.

Let me apologize. I am not going to remain for the entirety of this hearing; and the gentlewoman from Washington has agreed to chair when I must go.

The gentleman from New Jersey.

Mr. SAXTON. Mr. Chairman, like the chairman, I think that is incumbent upon us to recognize that there is a process that is needed in order to permit some experimentation, if you will, with some of the things that all of you have mentioned. You mentioned tax incentives, land exchanges, environmental bonds and maybe some other things that I missed.

Seems to me there is two basic questions that have to do with each of these attempts at preserving habitat for endangered species and for other purposes, and those two basic issues that we are going to have to deal with are, one, cost, and two, property rights. And in terms of cost, I raise this issue because it is something that we are going to have to deal with not only on this Committee, but as we begin to provide incentives or disincentives if we do through tax incentives or disincentives, then not only will this Committee be involved, but so too will the Ways and Means Committee, particularly if it has to do with the Federal tax code.

And so I raise that and question, number one, then would be just a general question, how do you think that cost will be a factor here as we proceed to put some type of a process into the bill?

Second question goes to property rights, and I come from this perhaps on a little different angle because of some experiences I have had in government with land preservation and what have you. To some, property rights has a very traditional meaning. Essentially it means to some that you can do with your property whatever it is you decide to do with your property. To others, and perhaps I put myself in this group, there are some who have watched property rights definition evolve from what it used to be to what it is today.

Used to be that if you owned some property and you wanted to clear-cut it, you went and did it, you burned the brush, you polluted the air, maybe you polluted the water in doing so as well, and that didn't inure to the benefit of people generally.

And so the definition of property rights today is much different than it was, say, a hundred years ago. So the second question goes to how do we deal with the issue of property rights as we proceed to put whatever mechanism we put in this bill?

Let me first address to Mr. Shaffer and then I would like to move to the right, to my right, our right end of the table to Mr. Kraft or the gentleman on the end.

Mr. SHAFFER. Thank you, Mr. Saxton.

Taking your questions in order, obviously this will have a cost. We have not devoted a lot of attention to thinking about how those costs can be covered. You know, on the philosophy of user pays, the reason we have so many endangered species is because we keep altering the American landscape through land use changes. We keep removing natural habitat from the landscape.

So perhaps a fee, some sort of real estate fee or development fee, could be used to provide the revenues to provide incentives to try and encourage private land conservation. I think it is very important that we be clear, and I hate to assume to speak for others, but I don't think anybody is in favor of creating subsidy programs that are just broad-based and not targeted at all.

I think some of our experience in the past with Federal subsidies is that they aren't well-targeted, they are inefficient, and often because they are not well-targeted, they can't be of sufficient magnitude for any individual to really get them to do what it is you're trying to get them to do.

I would just like to point out that the National Biological Survey, I think one of the intents of that organization, is to provide the level of data and information necessary to really get a handle on how many people is this going to affect, how much acreage is this going to affect, how do we target these kinds of programs in ways that can truly make them effective, without bankrupting the public.

So, it is curious, I think, that last week I understand there was a vote on the Floor of the House that expressed a great deal of constraint on the National Biological Survey, when at the same time you have at least one representative or a couple representatives of the conservation community here talking about being very flexible and supportive of the idea of incentives and to make them effective for the American taxpayer. To do this, we have to have good information.

To take your second point on the concept of property rights, I think it is an evolving concept. We have to understand that the Constitution was framed at a time when there were about four million people living on the edge of a continent. There are now 250 million people here, and in 70 years there will be 383 million.

What didn't matter back then, things that you did with your own property and your own land, now have broad social consequences for your neighbors and your fellow citizens. And so I think the concept of property use will always evolve.

I am not saying that we should be heavy-handed about that. In fact, I think if we are intelligent about incentives, we can achieve social purposes while rewarding individuals for socially positive behavior. That is a tack we have not taken and it is one we should.

Mr. SAXTON. Thank you. Mr. Kraft, you probably have about 15 seconds.

Mr. KRAFT. OK. I guess I would make a couple points.

One, we are talking about broad public benefit and there should be broad public funding. I also think that there could be some dedicated sources.

I think Randy O'Toole has some good ideas about using a portion of the revenues that are generated from timber sales from Federal lands that could go to help fund some of these ideas. I think the issuance of long-term bonds would make some sense.

As to private property rights, I think everyone here understands that it is an unsettled area of the law. I would point out that at the State level, we have significant regulation already in place that protects public resources. And if we want to move forward, we need to provide the types of incentives, maybe accept the status quo on private property rights because we could argue forever on that.

Mr. SAXTON. You can.

Mr. KRAFT. But I think if you degrade private property rights, there are significant unintended negative consequences that Randy O'Toole and others have outlined that when you lose the right to get the benefit of your property, you end up causing more damage through perverse incentives and that is what we are seeing today.

Mr. STUDDS. The gentlelady would from Washington.

Mrs. UNSOELD. Thank you, Mr. Chairman.

I would like to throw out some ideas that I have had in the past, and you can either shoot them down or say that some of them should be encouraged.

But in the past I have introduced legislation that would, one, provide capital gains tax cuts for private timber growers who wait until their timber is mature before harvesting and who reserve their timber for domestic mills instead of exporting the raw log incentives; and two, provide a 10 percent tax credit for such timber stand improvements as reforestation, restocking, thinning and fertilization; and three, clarify passive loss rules to allow wood lot owners to deduct certain management expenses.

Mr. Kraft, I would be particularly interested in your views even though I recognize that you represent a large landowner rather than the small independent wood lot owner that I was trying to focus on.

Mr. KRAFT. Well, I think that a capital gains idea is important. I think it would help the small landowners. I think when you talk about private property, however, it is very dangerous to start telling a private landowner who he can sell to. I think it is more important to focus on good management. Typical——

Mrs. UNSOELD. It was not to tell him who, but rather to give him a financial incentive to sell to a certain——

Mr. KRAFT. The cost of that is probably quite high. The international market probably provides a great differential in price between, you know, what people locally would buy. The broader the market, the higher the price. Capital gains, as I said, for a lot of small folks, is a very important issue.

Mrs. UNSOELD. OK. By removing the tax incentive for log exporting, we probably provided what you would maybe call a hard carrot by taking away that tax subsidy that was currently enjoyed by, until recently, log exporters.

Mr. KRAFT. With the last bill, that was eliminated. So the companies that were encouraged to export no longer have that tax incentive.

Mrs. UNSOELD. I am probably not going to have an opportunity for you to fully answer in this five minutes, all of you, but let me take a stab at it. I like the concept of habitat conservation plans that can accommodate multiple species. And I would like to be able to give landowners some certainty when they have come up with a plan, it has gone through all the process, and is approved.

How then, however—what kind of accommodation or do you think there should not be any accommodation for changes that we learn? I think there needs to be some certainty associated with that Habitat Conservation Plan to provide an incentive for landowners to go through that process, but how do you balance that certainty when things are going to change?

Mr. THORNTON. I think one thing you do is you have to share the risks associated with that uncertainty. That is, the Government has to share those risks. If you are going to leave the plans open for what has come to be referred to as the unforeseen circumstances problem, for example, then you have to create a situation where the government is going to share the burdens and the risks associated with changing a plan. It can't all be on the landowner.

Mrs. UNSOELD. How would that take place?

Mr. THORNTON. Well, for example, if a plan had to be changed because there was an unforeseen circumstance that developed and we discovered that the plan is really not going to do as good a job as had been hoped with regard to a particular species, and it is going to cost another million or $2 million to restore habitat or conserve habitat, the Government has to be prepared to step up and share in that cost.

Mr. MCKINNEY. I think one thing you need to consider is that if you deal with a multiple species approach, and really in most areas where you have that, they are dependent on a very similar habitat, that you are not going to have change. We are struggling with that in Texas now and outside of Austin we are dealing with nine species and the approach to take is really look at the habitat and focus on protecting it.

If you do that, then it doesn't really matter what species occur there and what you may find later because the habitat in which they occur is conserved and they will be covered. That is how we are approaching it. I think that is the whole point you are looking at.

Mr. THORNTON. Just one additional thought. The problem, of course, is as you do the plans now and even though you address an unlisted species, when that species becomes listed under the regulations as they are now interpreted, you have got to go back through the permit process. You then have new folks in the permit office who have different ideas, not necessarily bad ideas, but different ideas about what that plan should have done. And that creates uncertainty for landowners.

Mrs. UNSOELD. Thank you, Mr. Chairman. I will come back to this on a second round.

Mr. STUDDS. The gentleman from Texas, Mr. Fields.

Mr. FIELDS. Thank you, Mr. Chairman. I have a statement I would like submitted for the record. The Chairman talked earlier about reason and concern for private property rights, and I know he is sincere. And that is very important in this debate. It is very much appreciated.

I also think he is right. If we don't have reason and concern and sensitivity for private property owners, the Endangered Species Act as we know it is not going to be functional, or any Endangered Species Act of the future is not going to be functional.

That really leads to my question, Mr. Meister, Mr. Thornton, and to you, Mr. McKinney, because it is my sense that there has been a shift in attitude among private property owners, from a sense of cooperation now to a sense of hostility and confrontation regarding endangered species. And I just wanted to know whether you agree with that.

Mr. MCKINNEY. Congressman, yes, I certainly do. And that is really the reason I am trying to focus on this very area, just because of my own background and experience. And I will be honest with you, I use my own father as a barometer. My whole family has been in agriculture as far back as we can remember. And there has always been and always will be, I think, a respect for land and wildlife and habitat among those people. That is what they do.

And I have seen that in the last few years across Texas, because of some frustration of not knowing what they can and can't do, a very basic matter, that that whole situation has changed. I have seen and know of cases where people have gone out and taken actions that they probably would not have done, just out of sheer frustration. The attitude has shifted. And it is much more difficult for me and my biologists to do our work in the State because of that.

So there is no doubt about it and it frankly scares me.

Mr. FIELDS. Before the others answer, let me just follow up on that.

Are you saying that people are not cooperative with your biologists, won't let you on their property, won't allow you to conduct the tests and experiments that you need to conduct?

Mr. McKinney. Yes, sir, that is the point.

Mr. Fields. Mr. Thornton, is that the case in California?

Mr. Thornton. Well, there is tremendous antagonism in those areas where development has been stopped. And there are certainly significant areas, the kangaroo rat is probably the most notorious example, where many, many small landowners since the end of 1988 have been told they can't do anything with their property. And they are quite frustrated because they do not have the resources of a large landowner, developer, to spend literally the hundreds of thousands of dollars that it takes to process a section 10(a) permit, and they are very frustrated by that.

Mr. Fields. Mr. Meister.

Mr. Meister. Mr. Fields, one of the things our members tell us is that in the past high school biology teachers always had the right of access to a good many ranches and farms for class studies. That has now stopped. Two reasons, primary, the liability and the concern about finding a species that may be endangered on a place. The other thing is that other agencies such as Texas Parks and Wildlife are beginning to become not welcome simply because of the fear that those species may be found on a place. Gates are being locked. It is one of those things I think our landowners are certainly afraid that restrictions on their land are going to take place if the chance of a species be found.

Mr. Fields. Well, let me follow up on that, Mr. Meister, Mr. McKinney, and again Texas is my experience, it is your experience. But yet it is illustrative because a very large portion of our State is in private landowners' hands.

Why do you think farmers and ranchers would be interested in participating in a critical habitat reserve program?

And again, I am hopeful that is the case. I again want to express my appreciation to the Chairman for having a hearing like this, trying to find incentives. But today, why would people want to participate in that type of program?

Mr. Meister. Mr. Fields, there is a certain pride of accomplishment that farmers and ranchers have, a challenge, and they are faced with somewhat of an unknown. They are used to some programs such as our outlined soil habitat reserve program, through the Soil Conservation Service, through the ASCS and so forth. But they can accomplish the job.

They have the ability to propagate and nurture plants and animals and that is what they are real good at. And I feel that, if given the opportunity and considering perhaps the alternative that they are now faced with, they would go into a voluntary program such as this.

Mr. Fields. Voluntary cooperation and not mandated?

Mr. Meister. Yes, sir. You remember——

Mr. Fields. Mr. McKinney, excuse me, my time is about to expire.

Mr. McKinney. I think in many cases it is a situation of the unknown, where if they had the information to know what we could work with them on, that they would realize that the habitat that exists for endangered species on their property is there because they haven't done anything with it in the past and that is the only reason it is there, and so frankly their whole operation wouldn't be affected. But they don't know that and they can't be reassured by that.

Mr. FIELDS. OK. Thank you, Madam Chairman.

Mrs. UNSOELD. (Presiding.) Thank you.

The gentleman from Rhode Island, Mr. Reed.

Mr. REED. Thank you, Madam Chairman.

Mr. Kraft, I was intrigued by your discussion of land exchanges. Could you elaborate a bit? And in particular, it seems that you are proposing that one way to remedy the current defects in the act is to be much more liberal in trading lands that are part of the arrangement to protect the species and cannot be developed for the lands that can be harvested. Can you just elaborate further?

Mr. KRAFT. Sure. Currently, if you wanted to do an exchange with the Forest Service, there are two ways of doing it. You could do it administratively, or you could do it legislatively. Those are wholly separate processes from the habitat conservation planning process under Section 10.

We look at—we have 175,000 acres in a particular area in central Washington which has substantial spotted owl habitat. When we look at a Habitat Conservation Plan, it makes perfect sense to include as a part of that, the exchange of some of those lands that are probably intermingled with other Federal lands that are going to be used in ways which are really incompatible with private lands.

If you are familiar with President Clinton's Option 9, they have classified Federal lands there either as reserves or adaptive management or "matrixes" with minimal restrictions. And what would make sense would be to exchange out some of the private land that is intermingled in the reserve areas, that would help the Federal land managers manage their lands more efficiently, and exchange other Federal land that perhaps could be more suitable for commercial forestry elsewhere.

And it would be an incentive if you could do that as one integrated process under the Endangered Species Act, and do it in an expedited fashion. The latter is important because NEPA compliance is a real obstacle for a private landowner to do anything today. If you could streamline that process and you could put the exchange as a part of an HCP, you could make both easier and probably provide some incentives to landowners to go into the large scale conservation planning effort.

Mr. REED. Could I ask the other panelists to perhaps comment on that concept?

Mr. McKinney.

Mr. MCKINNEY. One of the things that I have considered in my conservation plans, or CCPs, is the opportunity to do just that, something other than the more traditional habitat conservation plans, and I am basing that on the plans that we have done in Texas, which are more, if you want to call it, urban or land development type of plans. Whereas we have very broad areas outside these developing areas that are primarily agricultural, but they have a lot of habitat within those areas.

So forming up cooperatives between those mostly agricultural landowners to create and restore habitat, it would seem to me, there should be a mechanism to foster that. Basically, selling credits, if you would, to the more traditional habitat plans in these developed areas, to some level, to help promote both of those ideas and to help solve both problems on a species level. But most habitat plans, the ones we are dealing with, don't really deal with the species recovery. They are a very localized type of mitigation situation.

Obviously, we want to go toward species recovery. And you are going to have to go to a broader space to do that. Some mechanism to broaden that out is a way of accomplishing it, I think.

Mr. REED. Any other comments?

Thank you very much.

Thank you, Mr. Kraft. You haven't disappointed the fellow alumni.

Thank you.

Mrs. UNSOELD. The gentleman from Texas, Mr. Laughlin.

Mr. LAUGHLIN. Thank you, Madam Chairman.

Dr. McKinney, it is good to see you again.

Mr. MCKINNEY. Good to see you, sir.

Mr. LAUGHLIN. I very much appreciate the Chairman's observation and comment about the reasonableness from the landowner's viewpoint. And following up on what Mr. Fields asked about attitude and reaction of landowners, we heard the comments from the panel.

But wasn't it in your area of the Habitat Conservation Plan in Williamson County that a biologist or Federal employee was shot by a landowner?

Mr. MCKINNEY. Yes.

Mr. LAUGHLIN. I don't want to know the details, but didn't that happen?

Mr. MCKINNEY. It did happen. It was a biologist from the University of Texas that was under contract with the local river authority to do some inspections on leased lands, and the landowner did do that, sir, yes, sir.

Mr. LAUGHLIN. But that was a manifestation of the hostility that we are hearing about.

Mr. MCKINNEY. I think it is about as serious as you can get.

Mr. LAUGHLIN. I referred to that before, it used to be the Communist Party and IRS were the enemy bloc people in our area of the country, and, unfortunately, and I think very tragically, some have transferred the enemy to people who are really trying to work in the environmental area. And I thought you might be aware of that instance, in which—I don't want to go into in more detail, but it is something that happened in relation to this Habitat Conservation Plan that was being developed there.

I also know that you are very familiar with the habitat conservation planning process, and I just wondered if you could share with us your ideas how the process could be made less expensive and cumbersome to encourage more rural landowners to participate in such planning.

Mr. MCKINNEY. Well, the point I was trying to get at with my approach of the cooperative conservation plans, was based on the fact that in Texas, for the most part, agricultural development, conversion of land, is not going on any longer. It is a very difficult economic situation, so we are not seeing a lot of conversion. The land that we have that contains habitat for endangered species now is there primarily because it wasn't converted to something else in the past. And it is not going to be in the future.

So if you have this land setting there, and as part of an agricultural operation that really isn't going to affect that agriculturist, it doesn't seem that we need to go into any great detail through NEPA or anything else to let these people come together to form a cooperative to identify these lands and make a commitment to conserve them, because they already exist, and then maybe even create more.

Whereas in the more traditional habitat conservation plans, we are talking about massive changes on the landscape, converting it to housing or something like that, where habitat is actually being destroyed. It seems to me, if you have a situation where the whole idea is not really to destroy the habitat, it is just there as part of a larger landscape, then to give them a vehicle so we can recognize that fact and to allow them to basically get credit for it, would be a simple process, at least from the level that I look at it, on a day-to-day basis.

Am I getting at your points?

Mr. LAUGHLIN. Yes, sir.

Mr. Fischer.

Mr. FISCHER. One point I wanted to make is on this topic of the amount that private landowners are disenfranchised from the Endangered Species Act, I think it is a valid point. But at the same time, I would be quick to point out my experience in Montana, when we were attempting to restore a wolf population, landowners, when wolves began killing livestock, they came unglued and they were calling their congressional representatives, they were vowing in the paper that they would shoot animals on sight, and it was this same sort of real negative situation. And we found simply by developing this compensation program, where we pay ranchers at market value for all their verified losses, that took care of the problem. And we don't have a controversy about wolves in Montana anymore, in northwestern Montana. We argue about them in places where they aren't, rather than where they are. And it wasn't a lot of money, it was $12,000 is what solved that problem.

So a lot of these debates, while they seem highly emotional, don't necessarily have a huge price tag on them.

Mr. LAUGHLIN. I see the light is on, so I will quickly ask Mr. Thornton; I was intrigued by your habitat credit proposal and I read through that section of your written statement, and I did not find who determines the value of that habitat credit in your proposal and can it be sold for cash and go out—if I get the habitat credits and I sell them to Mr. Tauzin, for whatever reasons, and do I get cash, can I go spend it any way I want, or what is the constraints?

Mr. THORNTON. That is exactly the idea. The market would determine the economic value of those credits and that is really the beauty of it. Perhaps you could have the defenders of wildlife acquire credits, as has happened in the emissions trading area with the environmental community actually acquiring emissions. That would be the beauty of that system, that you would let the market determine the value of those credits.

And I can tell you in California, there is probably significant value associated with mitigation property. In the wetlands area, we were involved in one case, frankly, where a landowner received up to $60,000 an acre as the wetland mitigation value for his property.

Mr. LAUGHLIN. But the market would determine the credit value rather than some government agency or——

Mr. THORNTON. That is correct.

Mr. LAUGHLIN. The farm lobby, the Wildlife Federation or any of the groups represented here today?

Mr. THORNTON. That is correct, we let the free market determine that.

Mr. LAUGHLIN. Thank you, Madam Chairman.

Mrs. UNSOELD. The gentleman from Louisiana.

Mr. TAUZIN. Thank you, Mr. Chairman.

Mr. Laughlin, I assure you, if you sell them to me, you get a promissory note, not cash.

I want to challenge the notion that the definition of property rights has changed in America. I don't think that has changed at all. In the Louisiana civil code, we have a very old, ancient article going back all the way to Justinian, it says that the nature of private property ownership is that you don't use your property so as to harm your neighbor.

It has always been the law. I don't think that has changed in America and that is the heart and soul of what we talk about when we talk about encouraging or prohibiting people from using their property in a way that harms their neighbor.

What has changed is the definition of neighbor. The neighbor used to be the guy next door. Neighbor now is the whole American public. And what has changed is the ever-increasing range of restrictions we put on private property ownership in the name of one or another very good cause that serves the American public. And so as that range of restrictions grows, not just in endangered species but in wetlands regulations, in liabilities, in all sorts of different things that government now imposes upon land ownership for the sake of the public good, we get into these heavy questions about whether we have reached a point where a taking has occurred.

And it occurs to me that we have some real soul searching to do here. If government comes along and takes 50 percent of the physical land I own to build a road, airport, a hospital, there is no question I will get compensated. But when government comes along and with a range of regulations takes away 50 percent of the use of all of my property, somehow I am not compensated. I have no incentive to participate, to cooperate with those regulations. That is the real issue here, that is the real thing we've got to decide.

And we can let it be decided in the Supreme Court at $500,000 a pop, for every landowner that can afford to go there, or we can make that decision in Congress. That is what this debate is all about. How do we incentivize landowners to participate and cooperate with these ever-enlarging range of regulations that we enact for the public good, for the good of all the neighbors of our country?

And, Dr. Shaffer, let me correct you on something, sir. You said that one of the purposes of the National Biological Survey Act was to find out how many people is this going to affect and how many acres will this affect. That is precisely what the National Biological Survey Act would not let us do.

We want to offer amendments to make that part of it. We are being told that is nongermane, that the issue of the effect on people and the effect on property is nongermane. That is why we are having this horrible fight, because people refuse to recognize that it is germane. It is germane if you want the cooperation of people and acres in the struggle to preserve plants and animals. That is what it is all about.

I wish I could offer that amendment. Unfortunately, I am going to be met with an objection when it comes to the Floor. I am going to be told it is not germane to consider how many people this law will affect and how many acres it will affect. That is what enrages private property ownership in America, when we are told we are not germane. That is what this fight is all about.

I am going to be limited in time, so let me get into it. You have recommended a range of incentives. I classify them in two classes, government and marketplace. In the government incentives, one of them is a disincentive. You recommend taking away subsidies and tax benefits for people doing things that may harm plants and animals that may be threatened or endangered. That is easily understood, and one we debate, when we talk about grazing fees and everything else.

Then you recommend a range of other government incentives. One would be direct tax credits, in one form or another. One would be giving a permit to someone to develop here in exchange for a cooperation there. That is using the permitting process as compensation, if you will.

Another is to say we are not going to regulate you as much if you sign into a program. That is exchanging regulation for cooperation. Another you recommend is a land exchange. You give us your land because it is a much more highly valuable habitat, we will give you some other less valuable habitat for you to develop on.

Another is dollars in compensation, either by contract or by purchase, either by paying someone to do the right thing, such as paying them for the cows so they don't kill wolves, or paying them for the purchase or the lease. One of you mentioned the lease of property, rather than easement, so that the public enjoys the benefits of habitat preservation on that property.

All of these involve dollars from the Federal Government. The only marketplace incentive anybody has recommended is habitat conservation credits.

Let me tell you, that is not a new idea, as you know. That is in the Clean Air Act. When we debated the Clean Air Act, we went through all of that, how do we encourage people to do the right thing in clean air.

One of the ways was to create a market system, to let the marketplace reward the good players. That is real incentives in the marketplace. Not a bad idea.

By the way, it is in our wetlands reform bill, in the Jimmy Hayes wetlands reform bill; mitigation, banking, credit, sale, exchange, to encourage people to do the right thing. I don't see any reason why we couldn't adapt it to habitat conservation in the endangered species bill, if we are real innovative and cooperative about putting that together.

My time has run out.

Have I missed anything? Is that the summation of the ideas I heard today?

Have I missed anything, Mr. Shaffer?

Mr. **Shaffer**. Could I just make one comment, Congressman?

I think that the market mechanism and transfer development rights or habitat credits is one of the potentially most powerful tools just from a central level. The problem that we have got right now is that, in our estimation, the government has been pretty conservative about what is an endangered species and there is some research that will be coming out soon to illustrate that point.

The point I want to make is, if we let things get in such bad shape that we can't afford to lose any more habitat, we have stripped ourselves of building a market mechanism to try and solve this problem.

Mr. **Tauzin**. We are out of time. Let me come back quickly.

We have the same problem in clean air. We had a law that said when EPA declared an air emission to be hazardous, the plant had to go to zero emissions immediately. The result was that the EPA did what it does in endangered species regulation. It was very reluctant to make a declaration.

What we saw we needed, and the environmental community and the business community finally came together on that, was much more flexibility. When the government did come to a hard choice of deciding whether an air emission was hazardous or not, it didn't have to shut the plant down. The plant had options to move toward zero emissions.

The changes in the law appear to be working. Now that we have the cooperation of the chemical industry, air emissions are going down rapidly. In my State, the moss is growing on trees, the buzzards are coming back. You know, things are going good.

The point I am making is that we can do the same thing with endangered species, if we started talking to one another instead of at one another. I just urge you to keep it up. I think we are on the right track.

Thank you, Madam Chairman.

Mrs. **Unsoeld**. Mr. Meister, can you respond very quickly, because Mr. Gilchrest has been waiting.

Mr. **Meister**. Yes, thank you.

I would just like to remind the panel the cost is now being borne by the landowners, so there is a cost attached already and that needs to be spread out among citizens.

Mrs. **Unsoeld**. The gentleman from Maryland.

STATEMENT OF HON. WAYNE T. GILCHREST, A U.S. REPRESENTATIVE FROM MARYLAND

Mr. **Gilchrest**. Thank you, Madam Chairman.

I would have hoped that the farmer in our midst could have given us a longer answer. I have a lot of agriculture in my area, so I appreciate the nature of the problem and its impact on agriculture and on a lot of people.

I would like to go back to this most interesting, fascinating topic of property rights. And be just a little bit philosophical for a second so that all of us, I suppose, can start off working from the same framework.

And what I am hearing today is some good compromise. I think people are beginning to listen to other people in this debate about endangered species, about a biological survey, about property rights and about people going on someone's property to evaluate what is there. And it is most important for the group of you who are sitting at the table to recognize that if we are ever going to achieve something in this debate, then you as leaders of the people that you represent must be willing to listen to all sides of the issue.

Private property rights—I think the private property issue is absolutely essential, this is just my judgment, the gentleman from Louisiana may disagree, but this is my perspective from Maryland. It is vitally important for us to understand the nature of private property rights from the perspective of what it was in 1793 and what it is now in 1993. We do need to have some protection for private property rights and understand the nature of my neighbor lives across the road or on the next farm. But because of this tremendous bulging population that we have on this planet, our neighbors are the next country, or our neighbors are people across the seas.

This is a tiny planet where the potential for human population never ends, at least at this point. What supports one species also supports the human species. A whole range of environmental support systems support the spotted owl. What supports the butterfly, what supports the Canadian geese, is a system that supports and continues to ensure environmental quality for human beings.

So what is the government's role? First of all, I think the framework is that we have to be willing to listen and understand the nature of the problem in 1993 and then know through predictions what the problem is going to be in 2093. And 2093 is going to come. And I think we have some responsibility for what the planet will look like in 2093.

So what is the government's role? I think it has been expressed very well here. The government's role in all of this is to create a structure that will be conducive through incentives based upon, to a large degree, on what the market will bear, for providing an avenue for people such as ranchers or timber owners, or anybody, to become involved in saving endangered species.

But it is so important for the leaders of this debate, which is us and you, to make sure we don't go off half cocked and say that you are going to lose your private property rights, that people are going to come on your property and do whatever they want, and they are going to regulate you to death, and they are going to put you out of business. That, in my opinion, is irresponsible and we must get together as people and do the right thing.

I apologize for not asking any questions, but—yes, sir.

Mr. KRAFT. Can I comment on that?

I think that we need to distinguish between very small types of projects that have very limited impact, very small number of acres, and something like the spotted owl or the bull trout, which is a candidate species at this point. When you talk about the spotted owl, private landowners like Plum Creek are substantially impacted since a third of our land in the region is currently inside circles. We stand to lose hundreds of millions of dollars of our property.

Mr. GILCHREST. Yes, sir, I understand. The nature of the spotted owl and your idea about land exchange, I think, needs to be considered.

My point is that don't, you know, shut the door to any possibilities. And don't shut the door and say people—the government thinks spotted owls are more important than people, because they are not. I think there is certain people that might think that, I suppose, but we have to understand that the nature of nature allows certain species to exist because there is a support system. I am not sure if all timber people would say, "shoot every one of those spotted owls, I am sick of them." The leaders should frame the debate such that there are alternatives to the conventional ways of doing things.

Mr. KRAFT. I support that and I think that is why this hearing is a very important and the work that everyone here and the ideas are important.

Mr. GILCHREST. Thank you.

Thank you, Madam Chairman.

Mrs. UNSOELD. The gentlewoman from Arkansas.

Ms. LAMBERT. Thank you, Madam Chairman, and to the Chairman of the Full Committee for holding a timely and critical hearing today. I would like to submit my written statement for the record.

[The statement of Ms. Lambert follows:]

STATEMENT OF HON. BLANCHE M. LAMBERT, A U.S. REPRESENTATIVE FROM ARKANSAS

Thank you, Mr. Chairman, for holding this very timely and critical hearing. In light of the recent debate on private property rights during floor action on the National Biological Survey Act, it is essential that we investigate the next logical step. We must determine, after we locate and map all the species and the lay of the land, how this information will affect private individuals and whether the Endangered Species Act will prevent an individual's right to use his land because of the adverse impact on various endangered species and their critical habitat.

Many individuals fear that once the National Biological Survey maps the whole environmental layout of this country, that endangered species will be found on their land, thus restricting current or future uses of their property. Under current law, the Endangered Species Act prevents the "taking" of endangered and threatened species. This section of the Act prevents landowners from hunting, capturing, or harassing endangered species whether found on public land or private land. "Take" is the key word encompassing a large range of activities, including habitat modification through development or use of the land.

I commend the Chairman's foresight in examining methods designed to encourage private landowners to promote the survival of endangered species and their habitat on private property. As we all know, plant and animal species know no boundaries—they exist not only on Federal land, but extensively on private property. Preservation of this country's natural resources is immensely important, but it shouldn't be at the expense of an individual's rights to use, farm, or develop his land. However, I believe that these two goals can work hand in hand.

A balance must be struck. If we continue to place the preservation of species ahead of the human race, you will see an uprising among the American public. There is already a wave of discontent rising. We must discover a way to address equally both the environmental and private property concerns. We must remember that most people don't want to destroy the environmental quality of their property or harm their animal or plant inhabitants. However, if the discovery of an endangered species infringes on an individual's use of one's own property, that fact will discourage any individual from creating or maintaining a habitable atmosphere for the endangered species, thus exacerbating the threatened nature of these species because these species would have no place to live.

I am open to any suggestions these witnesses may offer today to address this Catch-22 situation. We must consider new and innovative proposals to encourage endangered species habitat preservation and creation without burdening landowners with unfair land use restrictions. I look forward to today's hearing.

Thank you.

Ms. LAMBERT. Just a couple quick questions.

Dr. Shaffer, and really to the rest of the panel, you had specifically proposed to establish some type of a local and State property tax credit where land provides critical habitat for endangered species, which is a good idea. However, in a time where in many States like mine, the States and the local municipal governments, are crying out for less Federal Government mandates and more available tax dollars for their programs. They have tremendous amounts of Federal mandates without adequate resources to meet them.

Do you really think that the States could or would sacrifice their tax revenues by granting these tax credits and have you done any research into the States' abilities to grant such tax credits? And are there any States now that do grant environmental tax credits or deductions?

Mr. SHAFFER. To give you an answer, we have focused exclusively at the Federal level. I think we mentioned it in our paper. One of the situations we have in this country is that because property taxes are primarily local and to a lesser extent a State issue, you have great variation across the country. And many States and, I think, many western rural States already provide differential assessments to try and maintain rural lands and farms and ranches.

There has been a real boom in the land trust movement in this country. We have gone from 50 in 1950, to almost 1,000 now. These are local land trusts and many times there is some local provision to forego some property taxes or whatever. The point we were trying to make is that the individual landowner has to deal with three taxing authorities, local, State, and Federal. And we may not want to try and get the same provisions in every State across the country, because States are different. But there is no reason why the Federal Government can't send its own signal about the value of conservation by providing a tax credit in the amount of the local property tax.

Ms. LAMBERT. You are simply saying as an example the Federal Government should encourage States to do likewise?

Mr. SHAFFER. Exactly. And think of the situation in States, and I think there may be, or at least were, provisions in the past in California, where the State was giving property owners a tax break to try and maintain habitat. And then the Federal Government comes along and doesn't recognize that at all. So the State's effort is blunted by the fact that the Federal Government is not sending the same signal. So that is one thing that we think could really be addressed in a thorough study, is how do the different levels of government work together, share the burden and send a consistent signal so that we are not doing things at cross-purposes.

Ms. LAMBERT. Yes, sir.

Mr. MCKINNEY. I think your point is very well made. For example, in Texas we have an agriculture exemption for lands, and the legislative session before last, we extended that to allow that same exemption for wildlife use. Unfortunately, because of a definition problem, those who might want to manage for endangered species can't take advantage of that. It is only for game species.

But there are some areas like that which need to be looked at because they provide a small incentive at least. And from my perspective, I think all of these tax incentives that we have been talking about, are very important. They will work but they will be difficult to pass. So we shouldn't lose sight of the smaller steps.

For example, increasing the participation of State agencies. One of the big problems with the act which affects many people is just, frankly, a lack of knowledge and assistance that the Federal Government can't deliver. I have hundreds of biologists in the State of Texas working for our department, whereas the Federal Government has less than a hundred, and they can't deliver the information. So some help for States just to get the information out would be a form of incentive that could resolve many problems.

The ability for agricultural groups to form cooperatives or something like that on a smaller level, may not seem to provide a great incentive; it just makes it easier for them to work together, but that also make it an incentive, one that I think we should look at.

My point would be that let's look at all these incentives and credits, both great and small, because I think they will really work, but many will be difficult to pass. Let's not lose sight of some of the other things that can be done, like education and cooperatives, that at least make the burden a bit easier.

Ms. LAMBERT. Dr. Shaffer, do you expect to have some studies issued and when do you expect to have these studies issued examining the different tax structures and incentives on the State and local level?

Mr. SHAFFER. Well, this is a lot of work and we were kind of hoping that the government would do the studies. And so——

Ms. LAMBERT. Well, it is kind of dry up here, too.

Mr. SHAFFER. To the extent that we can help, we certainly will. And this is an area in which we will, as an individual organization, in cooperation with other environmental groups, I think you can expect to see some research in the future.

But I really do encourage the Committee to think of it. I don't think it needs to be terribly expensive, but a well-thought-out study that can really define the role of incentives. And look at what is out there, look at how it has worked, and be creative in thinking how we are going to put together a package that will really work for all of us.

Ms. LAMBERT. Just one last question, if I may, to Mr. Meister.

You had mentioned the proposal to create a critical habitat reserve program. I myself have thought about that, too, seeing the productivity and the acceptance of the CRP and the WRP programs, and how well they have worked, with the agencies working with the farmers and the agricultural entity. Can you elaborate on any proposal you have or the proposals you may be thinking of? How would this leasing program work and at what cost to the government?

What would be the rent for the lands, perhaps, or for the lease, and would it be on a sliding scale? Has that been thought out, or is it a suggestion on your part that they use the CRP and the WRP as models?

Mr. MEISTER. As a matter of fact, the CRP was the model for this plan. It was looked at and developed approximately three or four years ago for this particular plan.

The costs are some things that are going to have to be looked at. I don't know that you would have a set cost across the board. A sliding scale based on——

Ms. LAMBERT. Perhaps on the revenues forgone?

Mr. MEISTER. You have to develop all of the factors that would plug into the equation. And I would suggest that in one area of the State the rental would be different than another area of the State, just based upon the species, the habitat, value of the land as it is—productive value of the land. So it would work very much like the CRP program.

Ms. LAMBERT. Do you have a proposal?

Mr. MEISTER. It should be in your package.

Ms. LAMBERT. OK, thank you.

Thank you, Madam Chairman.

Mrs. UNSOELD. I have some additional questions.

But, Mr. Tauzin, do you have any, I would allow you to go first if you—I will stick with the five minutes, but go ahead.

Mr. TAUZIN. Thank you, Madam Chairman.

Just quickly, in the market-based approach to providing incentives to private landowners, there basically have been described three different designs: One is the internal investment bank where you literally have a barter system in which a public agency or developer negotiates a large-scale permit for a sequence of developmental decisions, and then the permit calls for you to restore or create wetlands in exchange for conservation credits. That is in the wetland banking concept. I take it that some of these may have relevance to the suggestions on habitat credits as well.

The second is the fee-based system, where a fee is charged to a developer, sufficient to cover the cost of restoration activities necessary to mitigate for damages that would be caused in the development. Then the government goes around using that money then to help restore habitat or wetlands, or whatever may be part of the program in that section.

The last is the commercial mitigation bank, which is a concept that is carried forward in the Hayes bill. It is the one where parties go out and create or restore wetlands to standards that qualify with a management authority. When the authority, in effect, says those standards have been met, then you get credit which you can then sell in the marketplace, much as Mr. Laughlin was describing to you.

Which one of these three do any of you think hold promise or problems for us? And which one would you favor if we move toward one of these credit programs?

Anyone of you.

Mr. Thornton, you want to go first?

Mr. THORNTON. Mr. Tauzin, I think all three of them can be of value in different settings. Certainly number two has been employed a lot. I think there are some major equitable issues associated with charging fees to individual landowners. You know, let's appreciate that what we are doing then is we are charging the landowners who, for whatever reason, because they were silly or foolish, or because they managed their property well, happen to have the last piece of endangered species habitat in the area. So they are taking on the burden that really should be shared by the society at large.

That, however, is a method that has been employed a lot in California. The kangaroo rat program has raised $25 million from fees on developers, as an example. I think your ideas number one and number three, and number three in particular, the notion of a commercial bank which is similar to the habitat transaction method that I spoke about, holds a lot of promise because it is creating an opportunity for some positive economic gain and is voluntary on the part of individual landowners.

Mr. TAUZIN. Yes, Mr. Meister.

Mr. KRAFT. I think that there is a real risk if you start imposing fees. Take the spotted owl situation. If all of a sudden, taxes are imposed on ordinary land activities that may affect habitat, there could be a taking of private property through the imposition of a fee. I think the idea of creating an incentive for private landowners to create habitat conditions would be a better alternative. For example, if we are very good—and I think we could be very good at providing nesting habitat, we could have lots of spotted owls growing on our land. And if we could get a credit for that, then there is a market to sell.

Mr. TAUZIN. So you would favor the commercial mitigation bank concept.

Mr. KRAFT. Absolutely. I think the private property issues become very sticky when you impose fees on legal activities that modify habitat.

Mr. TAUZIN. Environmentalists also object to the fee-based system, I am told, because they consider it a payment to pollute, which strikes a bad chord.

Any of you want to comment on that for me, please?

Mr. Shaffer.

Mr. SHAFFER. Well, I don't think you can say that the environmental community would speak with one voice on that. I think we saw that during the Clean Air Act, where some groups were more reluctant to support that or not. This just goes back to the point I have made several times and I will make it one more time and then I will be quiet about it, but the real value of these tools is to keep an adequate amount of all of our natural habitats so that all species are accommodated and we never get into these nettlesome issues of endangered species. And if we can keep thinking about what the real objective is here, then I think we can come up with systems——

Mr. TAUZIN. We share that view. But do you have an idea which one you would prefer of these?

Mr. SHAFFER. No, and again I think this reinforces the point of a need for a study to look really at what is going to be the most effective and equitable system.

Mr. TAUZIN. OK.

Anybody else?

Mr. MEISTER. Mr. Tauzin, I might add that the effectiveness of any one of these programs can perhaps work well in one area and may not in another. And as the Chairman mentioned, flexibility, I think that is of utmost importance in the whole process, is that all of these plans and ideas are good ideas, but they may not be applicable everywhere.

Mr. TAUZIN. Thanks very much.

Mrs. UNSOELD. Mr. Kraft, you referenced financial incentives were needed to pursue HCPs. Could you just tick those off so we do have them in the record?

Mr. KRAFT. Preparing an HCP is extraordinarily expensive. We have been looking at one for probably 18 months, and we have expended substantial sums on GIS systems and surveys. In fact, we are doing more surveys than the Forest Service. So the biological research costs are extraordinary.

Then, when you get into a mitigation situation, you are talking about significant dollar amounts to get that kind of a permit. And so talking about incentives, for example, there may be a way to use conservation easements to provide riparian habitat that may benefit not only spotted owls who use river bottoms, but also protect fish-bearing streams.

There may be other types—if we could agree in our plan to do certain prescriptions on our land, say, new forestry or certain types of prescriptions that would promote dispersion of habitat, that involves leaving green trees that cost money, that we might otherwise harvest in a different way. Just enough marginal incentive to cover the net cost that we would incur to manage our land slightly differently that would provide either habitat sooner or current dispersal of habitat. There are a whole host of things that you could do in the context of a habitat conservation plan that cost money, and if there could be ways, various ways, of compensating or inducing or providing some sort of financial return that makes a business manager look at that as a deal that makes sense.

Mrs. UNSOELD. Someone mentioned NEPA streamlining, and I want to come back to that in a minute, but first, Mr. Thornton, you probably have more experience with HCPs than anyone in this room. From the advantage of hindsight, if you could wave a wand and rewrite that provision, what would you incorporate into it or what would you take out from the way it was done before?

Mr. THORNTON. Congresswoman, I think the one single idea that has to be in that provision is dealing with the unlisted species issues.

Mrs. UNSOELD. Dealing with, I am sorry?

Mr. THORNTON. Unlisted species. If we can't provide the certainty and predictability to landowners such as our representatives at the table here, that once we go through the planning process and address the habitat issues that they are not going to be regulated in the future again as a result of subsequent listings, then those large-scale multiple species, multiple landowner plans, are not going to happen. And the reality today is they are not happening—there are a lot in the pipeline, but there are precious few that have been approved.

Mrs. UNSOELD. That provision is in the bill by the Chairman. And——

Mr. THORNTON. It is. It is in—and I think that is a helpful change. I would suggest that it should be incorporated into the main provisions of 10(a) and not establish two classes of conservation plans.

Mrs. UNSOELD. OK. Go ahead.

Mr. MCKINNEY. If I could just echo that. I think that is a key issue. We are working on a habitat plan in Austin, Balcones Canyonland Conservation Plan, and if it is successful, it will cost us over $100 million to complete. And it is dealing with 9 to 12 species, many of them listed. And the one issue that recurs over and over with the development side of the community as far as accepting the plan and really working with it, is that certainty issue. Because we have a number of other potentially listable species there. Unless we can deal with them at once, the support that we are going to need is not there.

So that certainty issue is the key issue—that is the one that recurs over and over in dealing with unlisted species and we really have to do that, we must have some mechanism to come to finality on that to get that support.

Mrs. UNSOELD. Mr. Kraft, was it you who referenced your feeling that NEPA should be streamlined?

Mr. KRAFT. Yes. I think if you look at habitat conservation plans, having to go through NEPA is a real disincentive. If you have to go through the next process after having worked for months and months and months with the Fish and Wildlife Service, and then have all of that put into an EIS that takes another year, and then there are legal and administrative challenges, then the process itself, which was designed to provide information to decisionmakers, gets to such a point that it takes so long and is so expensive that it frustrates, I think, legitimate conservation activities. There needs to be in Section 10 a mechanism to provide some sort of scaled down analysis. Analysis paralysis is a real problem.

Mrs. UNSOELD. I am going to exercise the Chair's prerogative and ignore what that light is about to do, because I want to hear a discussion from some of the rest of you, and particularly those representing environmental organizations on how you would respond to the kind of streamlining that Mr. Kraft was just—the problems that he was describing with the operation.

Gentleman, go ahead.

Mr. SHAFFER. I would like to respond to that, Madam Chairman, and perhaps respond to Congressman Tauzin at the same time, by going back to the National Biological Survey. I wasn't suggesting in my remarks that the survey was going to be getting maps of landownership and doing landownership studies. What I was suggesting is that we can see the magnitude of the problem now and we know we have got to have very good information if we are going to deal with this problem. And I think that goes to the certainty issue as well. I think it goes to the streamlining of the NEPA issue as well.

What we are doing, in essence, is with an incomplete information base, trying to decide one project at a time whether this is something we can tolerate and maintain the resources that we want to. And that is probably just the opposite of the way we should be approaching the problem. We should pull together the information that we have in our understanding of these systems, look at the kind of distribution of habitat in this country that will maintain biological diversity, and proceed to build that habitat network. So, however you go about this, there is so many themes where good information is absolutely central to it, and that is the point I wanted to make.

Mr. FISCHER. I think everybody is streamlining and making these things more simple. I think, you know, Larry's paper in our publication makes it plain that a real key to success of any of these sort of new incentive ideas is simplicity. And we have to think of simplicity, but at the same time, we still have to give everybody their chance to say this is good or bad.

I think we can't get around that. I think probably what we need as much as anything, is better certainty from the agencies that these things will be done on a schedule and that they stick to the schedules better. I think sometimes we get political interference in these processes that draws them out unnecessarily.

I think we could compress the time that it takes to complete some of these projects by developing schedules and staying with them.

Mrs. UNSOELD. Anyone else want to comment? Or debate each other on that issue?

Mr. THORNTON. Well, the NEPA process is clearly a problem with HCPs. There is plenty of precedent in a lot of EPA programs for recognizing what is referred to as functional equivalency. The clean water program has it, the clean air program, so that we are not duplicating analyses. Because that is exactly what is going on in the 10(a) process now.

Mrs. UNSOELD. Mr. Fischer, how would you respond to that?

Mr. FISCHER. I would just have to see. If it is duplication, we don't need duplication. We don't support that. Part of it, when you have these big HCP projects that involve huge expenditures of money, there are a lot of people who want to see how these things are put together and make sure they are done well.

I guess the other point I would make though is that so many of these things, you know, we focus on the HCPs, but at the same time, what I envision more is incentive projects that could be more geared toward specific endangered species problems. In some cases, it may be far less expensive and far less cumbersome to develop programs that involve more direct payments to landowners than to engage in a complicated HCP program.

Mrs. UNSOELD. Mr. Tauzin, did you want to add anything?

Mr. TAUZIN. I just want to strike the last word, if I may. I realize we are at the end of this hearing. I want to point out, Madam Chairman, that while this hearing focused on the incentives for getting landowner cooperations in the programs we ought to be addressing, that it did touch on some of the disincentives in the current law. But we missed one of the big ones, and I would like to engage everybody's thoughtful attention to it. And that is the nature of the current laws which create criminal sanctions for landowners.

Today as we meet here, a fellow by the name of, I think it is Bill Ellen, has been in prison for building duck habitat because he was found to be in criminal violation of the wetlands laws, even though he was following instructions of his landowner who was able to avoid prison himself by putting up $2 million to satisfy the government. This fellow didn't have $2 million, so he has been in prison for building duck habitat, essentially, in technical violation of the wetlands laws.

You look at this fellow's history, you will find out that he spent all his life building, creating habitat for wildlife. And yet he was in prison on a technical violation.

I have fishermen in Louisiana threatened with imprisonment for technical violations of the Federal laws. We created laws that have created a lot of fear on the part of the user society out there. And it is no wonder that people don't want soil conservation officials on their property and don't want government officials coming to do biological surveys to get good data, to make judgments like this, when our laws create conditions of criminal sanctions and then government agencies go out and try to make examples of people by putting them in prison, to scare the rest of us into obeying a law that may or may not make sense to some people. I just want to engage your thought on that.

At some point, we have to make our laws not only more acceptable to the people that are affected by them, and we have to bring the user groups in America in compliance because we give them incentives to want to work with us within the laws. I think we have to be very careful about where we impose criminal sanctions. In some of these areas they have done nothing more than create hostilities that we currently see building in America, when what this session was about was cooperation.

I realize it wasn't mentioned today, and I do want to mention it, because you can't fail to recognize, Madam Chairman, that it is a serious problem for landowners in terms of getting their cooperation with these laws, when they fear that someone they trusted, an SCS official, might be someone who reports them, and all of a sudden, they have criminal problems on their hands because of some technical violation of the law they didn't understand in the first place. It is a real problem for us. Maybe you want to comment on it.

Mr. THORNTON. Mr. Tauzin, if I made the comment, there is a related problem. Because of inconsistent enforcement, let's all appreciate—the Fish and Wildlife Service is very reluctant to bring criminal actions against folks, even though technically they might have the authority to do that under the Act. And so there ends up very, very inconsistent enforcement of the statute. And that breeds cynicism about the Act.

Mr. TAUZIN. Precisely that, inconsistency, that creates such cynicism. I mean, the Wall Street millionaire who owns the property, who instructed Mr. Ellen to go out and build these duck ponds, avoided his criminal sanction by giving some money to, part of it to an environmental organization, part of it to the U.S. Government, and got everybody happy and they left him alone. But the guy who carried out his instructions went to prison. And if that doesn't breed cynicism in America, I don't know what will.

I mean, when the rich can avoid the sanctions of a law by payment to both the government and to an environmental organization, and the less fortunate financially have to go to prison, we have to worry about a system like that. That is just one instance. But it is a great point.

It is the inconsistent enforcement, the targeting of some people, the irrational fear that it creates, that is stymieing, I think, the good intentions of the act. And it is one of the reasons why we have this awful situation where farmers and ranchers, let's face it, kill endangered species on purpose in order to avoid ever being found with them on their property. And that is not saving the species, nor doing us any good. It is an awful result.

Mr. Kraft.

Mr. KRAFT. Just one comment on that, I think it is a very good point. I would like to make another point, and that is that private landowners have a very strong land ethic. If you go out and you talk to our foresters and our biologists, they are out there and they want to do and they are doing things that are beneficial for the land. They care about it and I would encourage you to come out to our lands.

I think you have pointed out one kind of ultimate disincentive. I mean, personally, I am the compliance officer for the company. I could go to jail if someone out there on the ground makes a mistake. We spent probably close to $300,000 this past year just surveying our lands to prove that no owls were there. It is hard to do, proving absence. Pretty costly, too.

And I go back to the whole purpose of this hearing, which is rather than having regulatory-mandated sanctions, either taking the land or the ultimate sanction of going to prison, we would be far better off working out either direct payments, which I think makes some sense for certain species, or other types of incentives, and do away with the type of criminal sanctions or the penalties that you have in Section 9.

Mrs. UNSOELD. Thank you. This has been a very informative panel.

Would any of you like to add a last comment before we adjourn?

I would invite you to stay in touch, close touch with the Committee, and offer specific suggestions as the legislation progresses.

Thank you very much.

The Committee is adjourned.

[Whereupon, at 12:02 p.m., the Subcommittee was adjourned.]

TESTIMONY OF DEFENDERS OF WILDLIFE

Hank Fischer

Northern Rockies Regional Representative

FOR THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES OF THE COMMITTEE ON MERCHANT MARINE AND FISHERIES

U.S. HOUSE OF REPRESENTATIVES

Submitted on October 8, 1993

Mr. Chairman and members of the Subcommittee, I am Hank Fischer, Northern Rockies Regional Representative for Defenders of Wildlife. I cover the states of Montana, Idaho and Wyoming and have been actively involved in endangered species issues for more than sixteen years. I have worked longer as a professional conservation representative than anyone else in this region.

During that time, Defenders has employed the standard array of strategies to achieve endangered species recovery: we have worked on the development of recovery plans, we have urged agencies to implement those plans effectively, and we have filed lawsuits when agencies have failed to recover species.

We believe this kind of regulatory approach to endangered species management has been largely successful on public lands. As pointed out by a 1992 World Wildlife Fund study, of the approximately 74,000 endangered species consultations conducted by the U.S. Fish and Wildlife Service between 1987 and 1991, only 19 proposed developmental activities were terminated because of the Endangered Species Act (ESA). It's undeniable that a number of these issues have been extremely controversial--what Secretary of the Interior Bruce Babbitt has termed "train wrecks". But it's also undeniable that day in and day out the ESA is doing what it does best: modifying development and making it compatible with a diversity of life forms.

At the same time, the ineffectiveness of the ESA in dealing with endangered species recovery on private lands has made me aware of the limitations of a strictly regulatory approach. In my region--and I'm sure it's true elsewhere--the sanctity of private property rights are held just as dearly as the belief that we must prevent extinction. Consequently, if we are to make progress with endangered species recovery on private lands, we must also look at approaches other than a wholly regulatory one.

A 1993 report from the Natural Heritage Data Center Network places the gravity of this problem in its full perspective. It relates that approximately 50 percent of the 728 currently listed threatened and endangered species are found exclusively on private lands. And another 20 percent have at least half of their known occurrences on private lands. The inescapable conclusion is that no matter how well we manage endangered species on public lands, we will fail unless we address endangered species management on private lands.

Defenders began experimentation with providing economic incentives to private landowners in the Northern Rockies in the late 1980s, when wolf recovery was being strenuously resisted by livestock interests. The first major conflict erupted in 1987 when one of the original wolf packs killed several cows and a few sheep. Within days ranchers were calling their Congressmen and vowing that they would shoot any wolf they saw.

Defenders stepped in and asked its members to pay for these livestock losses. We felt livestock producers made a good point when they said that the public enjoys the benefits of wolves, but the ranchers bear the costs. Consequently, we initiated a program to compensate ranchers at market value for all verified livestock losses to wolves. Through contributions from our members and supporters, we developed a $100,000 fund. Since that first incident in 1987, we have paid a total of about $12,000 to a dozen different Montana livestock producers.

We think this is a small price to pay for having a wild wolf population in the Northern Rockies. Moreover, we believe the program has effectively shifted the economic responsibility of wolf recovery away from the individual livestock producer and toward the millions of Americans who support wolf recovery. Most importantly, wolf recovery is now proceeding in northwestern Montana with amazingly little controversy. It's a curious fact that the greatest discord over wolves involves places where they aren't rather than where they are.

Defenders's Wolf Compensation Fund has been praised on dozens of editorial pages and has received a special National Environmental Achievement Award. But for all its success, it has a built-in limitation: At best, it can only make the economic impact of wolf recovery on private landowners neutral. Therefore, in 1992 Defenders developed a new program designed to makes wolves an asset rather than a liability for private landowners.

We call it our Wolf Reward Program, and we pay $5,000 to any landowner who successfully has wolves breed on their private land and raise the pups to adulthood. Our goal is to influence the behavior of landowners who unexpectedly discover wolves on their property. Instead of remaining silent--or at worst, harassing or killing the wolves--we hope landowners will do what they can to foster the wolf's recovery.

It's too early to report on results--1993 is the first year the program is operational. But at this time, we believe we will have at least one landowner who will qualify for a reward.

Defenders' localized explorations with providing incentives to private landowners have brought us into contact with some of the nation's leading economists and endangered species experts. We have been impressed at the intensity of interest in and support for our programs. We have been surprised at how many people have solid ideas on how to use incentives to promote endangered species recovery.

We decided it was important to share this knowledge with the public and with Congress. In early 1993, we contacted some of these experts and asked them to write short, concise papers on how to build economic incentives into the ESA. Fourteen authors submitted papers, including resource economists, environmental leaders, endangered species biologists, developmental interests, a state wildlife agency director, and a regional director for the U.S. Fish and Wildlife Service.

Defenders' newest publication, "Building Economic Incentives into the Endangered Species Act", was published October 6. We believe it is the most exhaustive work on this subject that has been published to date. We will submit a copy along with our testimony.

After reading this publication, one point should be apparent to all: It isn't a scarcity of innovative ideas that is preventing the broader use of economic incentives to recover endangered species. Several papers offer specific proposals for incentive approaches that could be implemented immediately.

While the increasing din over endangered species management on private lands is new, it parallels a similar dilemma with the Endangered Species Act that arose more than a decade ago. In the early 1980s, reintroduction of several controversial endangered species was being stymied by interests that perceived the ESA as simply too restrictive. These interests argued that they did not oppose recovery, but rather, the ESA restrictions that recovery would bring. Nevertheless, these interests responded by proposing changes in the ESA that would have obstructed reintroductions.

Congress weighed all the arguments and ultimately arrived at an innovative solution. It reasoned that if reintroduction could be accomplished and recovery achieved without full ESA protection, this was clearly better than making no progress at all. An experimental provision of the ESA was created that gave federal managers license to create flexible reintroduction plans that were responsive to local and state concerns. The provision permits agencies to relax portions of the law, but only to the point where recovery is still achieved.

We face a similar impasse today. Private landowners are growing more antagonistic toward the ESA because they are concerned about government infringement on their private property rights. They see only proposed regulation and no benefits associated with providing habitat for threatened and endangered species. Their excessive response has been the immoderate "takings" legislation that's been introduced both in the House and the Senate.

But as the papers in our publication suggest, many innovative approaches are available that would make it more in a private landowner's interest to provide such habitat. Such incentives could replace polarization with cooperation.

The fundamental problem is that the ESA provides no process for testing new and innovative approaches. To the extent some incentive approaches are fresh and unproven, there's appropriate reluctance to adopt such ideas without sufficient trial. Sorely needed is a process that facilitates--even encourages--creative use of economic incentives. Through experimentation we can learn what works and what doesn't.

It's important to place the problems with endangered species management on private lands in the same perspective as the problems on public lands. Irresolvable conflicts are the exception rather than the rule. In most cases, endangered species recovery can be accomplished on private lands with minimal fanfare by making developmental proposals compatible with species preservation.

But as with the reintroduction of controversial endangered species, it would be useful to have an added tool to deal with the most difficult problems.

While Defenders believes the ESA is a good law that works well, we're certain it can be improved. While it may seem like we have been debating endangered species issues forever, our federal endangered species law is a mere twenty years old. Society is still taking its wobbly first steps at devising a system that effectively prevents extinction of the varied life forms on earth.

We think one way to improve the ESA--while showing sensitivity to those concerned about private property rights--would be to build a new process into the law that promotes experimentation with economic incentives.

I appreciate being asked to testify.

Addendum: Defenders continues to search for innovative ways to save our wildlife, and this search has led us also to explore new ways of protecting their habitat. Along these lines, I'd like to request that a recent paper by Defenders be included in the record.

INCENTIVES FOR PRIVATE LANDOWNERS UNDER THE ENDANGERED SPECIES ACT

TESTIMONY BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON MERCHANT MARINE AND FISHERIES

BY
LARRY D. McKINNEY, PH.D
DIRECTOR OF RESOURCE PROTECTION
TEXAS PARKS AND WILDLIFE DEPARTMENT
OCTOBER 13, 1993

I appreciate the opportunity to address this Subcommittee on the important issue of incentives for private landowners under the Endangered Species Act. While debate about the relative merits of many provisions in the Act, both existing and proposed, have been divisive I have found almost universal support for the need to amend the act to provide private landowners, and more specifically rural agricultural landowners, a better means of complying with it. The International Association of Fish and Wildlife Agencies and many individual state agencies have supported this call and I have included materials in my written submission to illustrate that point.

Texas is perhaps the most vivid example of what is at stake. Because of its unique location and size Texas is blessed with an abundant and diverse community of plants and animals, many of which are found no where else in the world. Texas is also a state dominated by private ownership of land and as result over 95% of the habitat base, a base upon which our state's biodiversity is centered, depends on those landowners to conserve and protect for the future.

While Texas may be unique in the extent of private ownership of land among western states, it is not singular. Private ownership of lands in these states averages 50%, with a low of 10-15 percent in states like Nevada and Alaska to a high (excluding Texas) of around 70% in states like Montana and Washington. The attached table provides percentages for each western state. The point is that private lands are clearly an important factor in the conservation of endangered species and must be given close attention in the Act.

The vast majority of these private lands are farms and ranches and as a result the responsibility for meeting the requirements of the Act has fallen directly upon those for whom agriculture provides a livelihood. That burden has been generally unrelieved by existing provisions in the Act and to have any hope of successful implementation any reauthorization must address two basic areas: technical assistance and incentives. A more detailed presentation is provided in the attached paper titled: *Reauthorizing the Endangered Species Act - Incentives for Rural Landowners.*

TECHNICAL ASSISTANCE

I cannot begin to enumerate the number of times farmers and ranchers have told me that all they want to do is the right thing, if only some one would tell them what they can, and cannot do. The USFWS simply does not have the resources to adequately provide that assistance. State fish and game agencies do. State agencies typically have staff all across their state and routinely work with landowners on wildlife issues that affect millions of acres of habitat. In many states, like Texas, agencies have developed staff expertise that also provides the primary scientific and technical basis of that assistance program and conservation of endangered species in general. In Texas the Resource Protection Division fills that role. A role that is identical to the newly formed National Biological Survey (NBS), but one that was established over six years ago. Resource Protection answers over 600 information requests about endangered species alone each month and assesses the impact of over 8,000 projects on fish and wildlife resources each year. The Division, which in overall responsibility is similar to that of the Ecological Services Branch of the USFWS, as well as the NBS, is one of the smallest operational units in the Department, yet its staff alone exceeds the entire presence of the USFWS in Texas. Within the Department several hundred biologists participate in conservation programs that no federal agency has a hope, or need of matching.

It is through state agencies that important assistance can be provided, and for the most part, it is the only practical way to do so. The federal government need not duplicate such resources, only fund and empower an already existing and functional organization to achieve the goals of the Act. Provisions to support this expanded state role should be included in reauthorization of the Act.

RURAL LANDOWNER INCENTIVES.

It clear that there must be positive incentives and simple procedures to increase the participation of rural landowners in protecting endangered species. Currently, good land management practices that result in creation of habitat is understandably considered a liability by most landowners. While I have no hard evidence to prove it I am convinced that more habitat for listed birds like the Black-capped Vireo and Golden-cheeked Warbler has been lost in Texas since their listing than would have been lost without the Act.

Incentives seem to fall into two main categories: Tax reform and farm programs.

Tax incentives, both income and inheritance, should be provided for landowners to not only maintain existing habitat for endangered species, but to actively manage for, and create such habitat.

Changes in farm programs could allow for both the opportunity and funds to conserve habitat. The Conservation Reserve Program is one example where the creation or restoration of such habitat could be given priority consideration while still meeting the original goals of the program at no increased cost.

Because these incentives would require considerable federal funding or tax reform it will be difficult to gain support for them. Nonetheless, they represent the best and most effective of the incentive options that I have seen.

COOPERATIVE CONSERVATION PLANS

Another approach I would recommend is not dependent on such funds or reforms, and while the financial burden remains with the landowner it provides a mechanism in which they have greater control over actions on lands that have endangered species habitat, allows them to work cooperatively with minimal federal oversight, and provides some means of cost recovery for approved actions. I have called them "Cooperative Conservation Plans" and they are loosely modeled on the existing Habitat Conservation Plans provided for in Section 10 of the Act.

CCPs would allow agricultural landowners with contiguous or nearly contiguous property to form cooperatives to accomplish the same goals as provided by a HCP, but without the EIS requirements and similarly complex and expensive technical requirements of an HCP. Such requirements would not be necessary for CCPs as little land use change would be contemplated due to their nature. CCPs would operate more in the form of a wildlife management cooperative, a concept that has shown to be an increasingly accepted and successful means of pooling rural landowner resources. The Fish and Wildlife Division of Texas Parks and Wildlife has undertaken several innovative efforts, focused on game species, that could be excellent models for CCPs. Their success is the basis for the CCP concept.

Ideally, CCP's would provide more direct landowner control, priority access to federal programs, allow for flexibility in meeting the needs of agricultural operations, and potential income generation, but without compromising biological constraints. If successful an increasing number of functional CCP's would begin to approach management closer to the ecosystem scale that would move the Act in the only direction possible for it to ultimately be successful. The successful implementation of CCPs will require allowance in the Act for some risk-taking and the possibility of failure, as does any shift away from an existing paradigm. My assessment of current conditions and options leads me to believe that we have little choice.

It is important that private landowners in rural and agricultural settings be provided the means and incentive to comply with the Endangered Species Act. If we do not, then in states like Texas, the Act will fail to meet its goals and may even have the opposite effect. Rural landowners and the habitat for which they are stewards have a critical role to play in conserving this nation's biodiversity. We must provide them that opportunity.

INCENTIVES FOR PRIVATE LANDOWNERS UNDER THE ENDANGERED SPECIES ACT

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SUPPORTING MATERIALS

Reauthorizing The Endangered Species Act - Incentives for Rural Landowners

International Association of Fish and Wildlife Agencies - Letter of May 6, 1993 to the Honorable Gerry E. Studds supporting landowner incentives.

Excerpt from Endangered Species Reauthorization Materials - Montana Department of Fish, Wildlife and Parks

Table - Percentages of privately owned lands in the western United States

REAUTHORIZING THE ENDANGERED SPECIES ACT — INCENTIVES FOR RURAL LANDOWNERS

Larry McKinney
Director of Resource Protection
Texas Parks and Wildlife Department

The Endangered Species Act (ESA) has had broadly felt impacts in Texas. Two lawsuits and the development of a regional habitat conservation plan have been the focus of much of that attention over the last several years. Moreover, the ESA has had significant impact, especially on rural landowners. The impact of the ESA on those individual private landowners in Texas, who control over 95 percent of all lands, has generally been unrelieved and essentially unrecognized in the act. Available options like habitat conservation plans have been out of reach of private landowners because of cost and complexity of meeting procedural and technical requirements. This is an important failing, especially in states like Texas, where much of the habitat for listed species is owned by private landowners.

THE ESA IN TEXAS

Two lawsuits and the development of a regional habitat conservation plan have been the focus of controversy about the ESA in Texas. Geographically, the impact of the lawsuits span much of the state. As a result, the ESA has received a great deal of attention and debate. Attitudes and opinions are fairly representative of those common to the national debate on the ESA, except that more Texans may have been more directly affected than other Americans because of the overwhelming percentage of private land ownership and the number of listed species in Texas.

Red-cockaded Woodpecker. The red-cockaded woodpecker is an endangered species residing in mature pine forests throughout the south. In Texas, the bird is restricted to the eastern pine forests. Silviculture practices of the United States Forest Service (USFS) in Texas were the subject of a 1988 federal lawsuit by the State Attorney General's Office and several conservation groups who felt those practices threatened the continued existence of the species. That assertion was upheld in federal court, and following a lengthy appeal and internal changes in management practices, the USFS has undertaken actions to comply with that decision. Numerous colonies of the bird do occur on private and state-owned or managed forests, and those entities must also comply with the ESA, although they were not subject to the court's decision.

Edwards Aquifer. The Edwards Aquifer Lawsuit was filed by the Sierra Club and downstream users against the U.S. Fish and Wildlife Service (USFWS) in

1992. The lawsuit charged the agency with failure to protect listed species dependent on two major springs fed by the aquifer. The aquifer is also the sole source of water to San Antonio —Texas' third largest and one of the state's fastest growing cities. Increasing use of the aquifer by the city and continued use of it by western agricultural interests threaten spring flow and thus the existence of the listed species. Under Texas law, groundwater is an unregulated right of capture. Regulation of the aquifer as a means of protecting the listed species was the focus of the suit. Recent legislative action to bring the aquifer under regulation has resulted in a possible settlement of the lawsuit, but not necessarily the issue since implementation of the state plan is only now beginning. Disaffected parties are looking to the next legislative session to reverse that decision.

Balcones Canyonland Conservation Plan. The Balcones Canyonland Conservation Plan (BCCP) is another ESA-driven action to prepare a Habitat Conservation Plan (HCP) for Travis County and the City of Austin. Only one other has been approved in Texas, and that was in the same general area, but restricted to a relatively small area of karst (limestone caverns) that contained listed invertebrates.

The BCCP is one of the most ambitious HCP's to be developed, as it would protect nine listed species and several candidate species. A preserve system of 60,000 acres (USFWS refuge and 30,000 acres of state/local preserves) is proposed at an estimated cost of over $100 million for acquisition and management. Nearly, one-half the funding has been secured and both the federal refuge and planned preserves are in the process of being acquired. Legislation to provide a funding mechanism for management failed to pass in 1993, and the funds to complete the HCP and provide for management remain to be secured. The fate of the plan is now uncertain, although a number of options are being considered.

THE ESA AND THE REST OF TEXAS

While these actions have received much attention, they do not define the extent of ESA impact in Texas. There are 82 federally listed species in Texas and 305 candidate species. Of that total, only 13 of the listed species (18 percent) and 23 of the candidate species (13 percent) are affected by the legal actions described above.

Two of the species, the black-capped vireo and golden-cheeked warbler, are migratory neotropical songbirds whose summer breeding range includes specialized habitats in central and southwestern Texas, which is mostly in private ownership. Thus, much of the birds' habitat, especially that of the vireo, is not included within the BCCP. The red-cockaded woodpecker is confined to east Texas, and while the lawsuit dealt only with federal lands (National Forests), numerous colonies of the bird are found on state and private lands throughout the region.

The common thread running through the two lawsuits and the HCPs is that, for the most part, responsibility and cost for meeting the requirements of the ESA (either by option or by court mandate) are being met by a governmental subunit: the USFS, USFWS, the State of Texas, Travis County, the cities of San Antonio and Austin and, in the case of the one approved HCP, a large and well-funded private development concern.

This is not the case for the vast majority of individuals and lands affected by the ESA in Texas. Because 95 percent of the land in Texas is in private ownership, and much of that is rural farm and ranch lands, so too is the vast majority of endangered species habitat. Thus, the responsibility for meeting the goals of the ESA to protect and conserve endangered species in Texas falls on: rural landowners, especially farmers and ranchers. That burden has generally been unrelieved by government assistance programs or planning efforts like the BCCP.

In rural areas, like central and west Texas, the ESA has been applied primarily as a regulatory action by the USFWS because of their own limited resources (staff and funds), the lack of significant public lands, the somewhat isolated and large size of the area, and the relative lack of biological understanding of the area.

While it has not been the intent of the USFWS to operate in that manner, it has been perceived by many landowners that the agency has instituted a policing action to enforce the ESA in areas where land use is limited by federal law without compensation or assistance. This perception has been exploited by some to promote various self-interested agendas. Such tactics are not uncommon on either side of the issue, and considerable resources have been expended in that cause. The USFWS has only limited resources to counter such misinformation. Even where the concerns are well founded, the USFWS has few resources to assist those legitimately affected, those who have a real need for relief. I cannot begin to enumerate the number of times ranchers have told me that all they want to do is the right thing, if only some one would tell them what they can, and cannot do. Unfortunately, this has not been generally possible because budgetary constraints have denied the USFWS the resources it needs.

Consequently, it is difficult to bring these mostly rural, private landowners (primarily ranchers) together to deal with requirements of the ESA. They simply see no effort on the part of government to assist them in a meaningful way. It is important that we correct this failing in Texas because so much endangered species habitat is under the stewardship of private landowners.

At this stage, nothing may provide the incentive for these individuals and the organizations that represent them to do anything other than seek extensive revision of the ESA and thus avoid the problem altogether. That course of action reflects the frustration of these landowners with the current provisions of the ESA and how it is being applied. It is a particularly alarming attitude because most of them would never contemplate doing anything to harm endangered species as they have a strong land stewardship ethic passed down through many generations.

THE CASE FOR INCENTIVES

Depending on the outcome of the ESA reauthorization debate, and assuming that habitat protection remains undiminished by reauthorization, a means must be found and incorporated into the ESA of assisting rural landowners to comply with the act. Indeed, one of the greatest stumbling blocks has been the lack of a means to assist landowners and to provide incentive for action. Conversion of habitat is much less rapid in rural areas than in urban areas. Given the increasing costs converting land to agriculture, incentives to rural landowners serve to encourage use of land management techniques that aid in protecting endangered species.

If the ESA does not begin to provide positive incentives to private landowners, then the act will continue to be ineffective in achieving its goals on private lands, and in fact, may have the opposite effect. While I have no hard evidence to prove it, I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all. Undoubtedly, some landowners unwittingly destroyed habitat before the USFWS identified it as such and imposed restrictions. But ranching is not expanding in Texas; that time has passed. The remaining habitat for listed species, like the vireo and warbler, exists because it wasn't converted to pasture years ago, before those species were even listed.

ASSISTING RURAL LANDOWNERS

Two areas where the ESA must be amended to provide better assistance to rural landowners is in technical assistance and incentives. It is important to clearly distinguish between two classes of landowners in this regard. Rural landowners are typically farmers and ranchers, holding land for agricultural purposes. In Texas, such landowners qualify for agricultural exemptions that reduce local property taxes. That exemption helps differentiate them from other landowners who hold land for development or other purposes.

Development-oriented landowners have the resources to use existing provisions of the ESA, such as Habitat Conservation Plans. They also are more interested in large-scale alterations of the landscape to meet some development goal. In contrast, such changes have already taken place in rural areas (like pasture development). Where changes have not occurred in rural areas, the land is reserved for wildlife, soil conservation, or related purposes, and the general emphasis is on vegetation management. The ESA must be amended to enhance the means by which technical assistance and incentives are provided to rural landowners.

Technical Assistance. The USFWS simply does not have the staff resources to provide adequate assistance to rural landowners. State fish and game agencies, like Texas Parks and Wildlife, have staff all across Texas who routinely work with landowners on wildlife issues. It is through such agencies that important assistance can be provided, and for the most part, it is the only practical way to do so. Providing this assistance can be accomplished in three ways:

> 1. Expand the role of state agencies in providing education and technical assistance by designating them as the lead agency for such actions and by adequately funding them to do so under Section 6 of the Act. Allow projects to provide for continuous monitoring, education, and technical assistance by state agencies to be funded under Section 6 as a priority activity.
>
> 2. Provide the means and funds to apply the habitat conservation planning processes and Section 6 funds to candidate species as a means of preventative management, decreasing the likelihood of eventually listing those species.
>
> 3. Focus on recovery actions for species occupying the same habitat — a more ecosystem-focused approach — to make it less likely that other species in the same habitat will be listed in the future. An ecosystem approach is one important key to making the ESA function.

As noted in the first point above, Section 6 provides for cooperative programs with state agencies. This should be given the highest priority by the USFWS and the funding greatly increased to allow for a strong and effective state role in conserving endangered species. The second and third points are proposals already contemplated, at least in part, in HR 2043 and should not be lost even if other reauthorizing legislation is eventually adopted.

Incentives for Rural Landowners. Recent experience and common sense make it clear that there must be positive incentives and workable procedures to increase the participation of rural landowners in protecting endangered species. Currently, good land management practices that result in the creation of habitat for endangered species is understandably considered a liability by most landowners. Three such incentives come immediately to mind and should be given serious consideration.

> 1. Tax incentives should be provided for such landowners not only to maintain existing habitat for endangered species, but to manage actively for, and to create such habitat.
>
> 2. Inheritance tax reform could be used to assure that large tracts of habitat do not have to be broken apart, but are maintained to conserve their wildlife value.

3. Provisions in farm programs could be modified to allow for both opportunity and funds to conserve and manage for endangered species habitat. We pay farmers not to plant various crops and ranchers to practice good soil conservation as being in the national interest — why not to protect endangered species as well?

These ideas have been considered by others and will undoubtedly be presented in greater detail in other proposals. I will consider them no further here, but I do support them as the best and most effective of the incentive options that I have seen. However, they all require considerable federal funding or tax reform, and therefore, will have a difficult time in being accepted.

Another approach I recommend for consideration as a incentive to private landowners is not dependent on such funds or reforms. Section 10 of HB 2043 could be expanded to include a provision for "Cooperative Conservation Plans" as described in the following section. While the financial burden remains with the landowner, it provides a mechanism for greater control over actions on lands that have endangered species habitat, allows landowners to work cooperatively with minimal federal oversight, and provides some means of cost recovery for approved actions.

COOPERATIVE CONSERVATION PLANS

Provisions for Habitat Conservation Plans (HCP) already exist in the ESA and provisions in HB 2043 improve the potential for their successful development and implementation. An especially important improvement is the establishment of the Habitat Conservation Planning Fund under Section 9(b)(1) of HB 2043. HCP's are complex and expensive to undertake because mitigation is usually extensive. Plans are typically for land development projects that anticipate widespread landscape alteration and loss of habitat. There is another category of land use, agricultural, that could benefit from HCP's in meeting the requirements of the ESA. However, the current form of HCPs are financially, and to some extent technically, out of reach of the typical farmer and rancher.

Cooperative Conservation Plans (CCP) would be a variation of the HCP available to nongovernmental groups or individuals whose primary land use was for agricultural purposes, but without the EIS requirements and similarly complex and expensive technical requirements of an HCP. Such requirements would not be necessary for CCPs as little land use change would be contemplated because of their rural nature. CCPs would allow landowners with contiguous or nearly contiguous property to form cooperatives to accomplish the same goals as provided by a HCP. It would operate, however, more in the form of a wildlife management cooperative, a concept that has shown to be increasingly successful and accepted means of pooling rural landowner resources to benefit both the landowner and wildlife.

The underlying premise would be to establish, within the cooperatives boundaries, an agreed upon acreage of habitat that would be maintained by the cooperative for the period of the permit, but not necessarily fixed in location. The flexibility to manipulate where habitat would be maintained is a key point in working with these landowners. As the agricultural needs of a member required conversion of habitat acreage to agricultural uses, other habitat (i.e."habitat credits") in excess of permit requirements could be exchanged between members. Creation of habitat by landowners could add to available credits or offset losses, and a market could be established to buy, sell, or trade within the cooperative.

HCPs could also go to cooperatives with an approved CCP to purchase credits in the form of easements to help meet, but not substitute entirely for, mitigation requirements if the same species were involved. This would create an additional market for the cooperative.

HCPs in urban areas like the Austin BCCP (Balcones Canyonland Conservation Plan) are expensive because of land values and the complexity of managing urban preserves. In the case of the black-capped vireo, BCCP mitigation within the plan area will be expensive, and even if successful, will contribute little to recovery of the species. If one could take even part of the monies being expended on that species in the BCCP plan area and go to Val Verde county (one of several areas with extensive vireo habitat and bird populations), and pay land owners for what they do best — managing land — to create and manage for vireo habitat, we could provide ten times the habitat over the life of the BCCP's 10a permit than could be accomplished in the BCCP plan area. In doing so, we could make a significant contribution to species recovery, assist landowners by compensating them for restricting land use, and considerably ease the mitigation difficulties often facing HCPs.

The constraints of such an approach would be no different than for HCPs in that the key issue in gaining approval for their implementation would focus on biological issues, taking into consideration such factors as genetic distinctiveness of local populations, etc. Even so, the CCP process could certainly help rural landowners near urban areas maintain endangered species and traditional lifestyles.

CCPs would have to be given a priority in accessing federal and federally funded assistance programs to provide technical and management assistance like habitat creation. This is necessary because the resources to acquire technical expertise are often beyond the means of rural landowners. To assure success of CCPs, they need that basic help. That assistance should come primarily through state wildlife agencies. State agencies work closely with landowners in game management, and they generally have long-established relationships with landowners.

Mistrust has been one legacy of the ESA that will not be easily or quickly overcome. Even state agencies have been painted with that broad brush, and it has created difficulties in working with landowners on a wide range of conservation issues. Implementing the CCP should allow for oversight of CCPs to be local once a plan is approved by the USFWS. The state wildlife agency would be responsible for any monitoring needs and technical assistance, with as much autonomy as possible from federal intervention.

CONCLUSION

In conclusion, it is important that private landowners in rural and agricultural settings be provided a means of complying with whatever provisions that come with reauthorization of the ESA. No such means are readily available to them in the current version of the act. If we do not provide such means, then in states like Texas will fail to meet its conservation goals. These rural landowners and the habitat for which they are stewards have long been taken for granted. Without private landowners, and the good land stewards among them, the situation for endangered species would be far more critical than it is at the present. With them, as active and willing partners, endangered species have a chance for the future.

I.A.F.W.A.

International Association of Fish and Wildlife Agencies

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May 6, 1993

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Honorable Gerry E. Studds, Chairman
House Committee on Merchant Marine and Fisheries
Honorable H. James Saxton, Ranking Member
House Subcommittee on Environment
and Natural Resources
U.S. House of Representatives
Washington DC 20515

Dear Congressman Studds and Congressman Saxton:

The Association commends your introduction of Endangered Species Act reauthorizing legislation which makes substantial improvements in the law without reducing its strength. These provisions reaffirm the role of the State fish and wildlife agencies in the conservation of threatened and endangered species and their habitats; improves the Act's administration and workability; and provides incentives to more appropriately and actively involve private landowners in meeting the Act's conservation objectives. The Association supports the existing Act and its objectives, but recognizes and supports improvements in its administration which make it both more effective and workable.

The role of the State fish and wildlife agencies is vital to meeting the objectives of the Act. As you are aware, it was the intent of Congress that the objectives of the Act be met through the full cooperation of the States with the USFWS and NMFS. Your bill reaffirms that cooperation in all aspects of the Act and its processes, and ensures that the Federal Advisory Committee Act is not an impediment to this government to government cooperation. The State fish and wildlife agency involvement adds, in our opinion, scientific information and supports the science involved in and the processes established under the Act. This will increase the success of the Act in meeting its objectives.

We appreciate and support the provision in the bill which gives greater emphasis to preventive management. Opportunities to apply the Habitat Conservation Planning process to candidate species; and the focus on recovery actions for species occupying the same habitat should facilitate conservation actions to recover species and habitats before the need to list is required.

The Association enthusiastically supports equalizing the de-listing responsibility of the Secretary with the listing responsibility, and also the attention directed to designing and implementing species recovery programs. The manifestation of the Act's success is in recovering and de-listing species, not adding more species to the list. Recovery needs to be advanced at a much greater rate than it has proceeded.

We fully support the initiatives to provide for greater involvement of the private landowner in meeting the conservation objectives of the Act. We cannot meet the objectives of fish, wildlife and habitat conservation without involving the private landowner, and your bill is a good step in that direction. We encourage you to continue to look at other initiatives (such as tax incentives) to further this goal.

Finally, we appreciate the recognition of the need for additional funding to meet the objectives of the Act. We must simply dedicate more money to natural resources conservation in the United States if we are to ensure that our future generations are also able to enjoy the magnificent natural treasures of this nation.

The Association applauds your efforts which culminated in the introduction of this bill, and look forward to continuing to work with you and your staff to successfully enact this legislative proposal.

Sincerely,

Gary J. Taylor

for R. Max Peterson
Executive Vice President

cc: ✓State Government Members

The following is excerpted from the Montana Department of Fish, Wildlife and Parks Endangered Species Act Reauthorization Materials:

E. ESA INCENTIVES TO RURAL LANDOWNERS

Problem Statement

As the Act encompasses increasing numbers of species and lands, the rural landowner frequently stands as a crucial medium between the Act and the species it seeks to preserve. Rural landowners typically view themselves as stewards of the land, have a long term investment in the land, resent government interference (particularly federal), are often motivated more by preserving their lifestyle than by economic gain and are extremely protective of private property rights.

The Act does not distinguish between the activities and motivations of these landowners from those of a large developer who generally has far more resources, a short term investment in the land and is primarily motivated by economics.

Rural landowners generally want: 1) to actively participate in land use decisions, 2) clear, achievable requirements whose true costs are reimbursed and which come early in the process so there are no surprises, and 3) a reasonable, predictable appeal process.

Solutions

1. Cooperative management agreements or Habitat Conservation Plans require an EA or an EIS. These can represent significant burdens to the landowner. Such burdens may nullify the benefits of Payment in Lieu of Taxes, income tax credits, or other types of reimbursement or incentives. To ensure that incentives do what they are designed to do, there must be some changes in this aspect of the EA process such as a categorical exemption for incentive based initiatives or limitation of appeals on certain EAs.

2. Private landowners participation in the formulation of a recovery plan is essential. A mechanism should be considered which allows the private landowner to have a say in the recovery process. If the private landowner feels that their concerns are included and utilized in any recovery plan impacting their property, there will be greater acceptance of any such plan.

3. The easiest ESA incentives to conceive and to implement are those that affect an individual landowner's pocketbook. Some examples include: ESA inheritance tax breaks for those landowners who make an ESA commitment or conservation easement applicable to an ESA recovery plan or take preventive measures to avert the need for listing; an income tax credit for landowners to encourage habitat protection for recovering species or to host an endangered or threatened species on their land or to avert the need for listing a species; tax breaks for lands that landowners maintain in native habitat. For example, private individuals could be exempted from income tax for all income generated from sustainable use of native habitats, according to a plan agreed to by the appropriate state agency; a Payment in Lieu of Taxes program to reimburse local governments, school districts and private landowners for property lost to productive use because of ESA strictures.

PERCENTAGES OF PRIVATELY OWNED LANDS IN THE WESTERN UNITED STATES *

ALASKA	12.9
ARIZONA	56.9
CALIFORNIA	53.6
COLORADO	63.8
IDAHO	36.3
MONTANA	69.7
NEVADA	14.9
NEW MEXICO	68.7
OREGON	51.3
TEXAS	***98.1***
UTAH	36.4
WASHINGTON	70.8
WYOMING	50.5

* Based on 1987 data from: Almanac of the 50 States, 1991.

THE WILDERNESS SOCIETY

Testimony of Dr. Mark L. Shaffer

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Before the Committee on Merchant Marine and Fisheries
U.S. House of Representatives

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Thank you, Mr. Chairman, for the opportunity to address the Committee on a very important issue in reauthorization of the Endangered Species Act (ESA).

The issue before us today is the potential for financial incentives to enhance the effectiveness of the ESA in the effort to conserve our nation's biodiversity resources.

Earlier this year, The Wilderness Society prepared a white paper outlining a variety of incentives and disincentives that we believe should be considered for inclusion in the ESA or through separate legislation. This paper, entitled *Economic Incentives to Preserve Endangered Species and Biodiversity on Private Lands* is included among those compiled by Defenders of Wildlife. A copy is attached to my statement for the record.

Why Consider Incentives?

In 1990, the EPA's Science Advisory Board concluded that species extinction, loss of biodiversity and habitat alteration and destruction rank among the greatest risks to the natural ecology and human welfare (U.S. Environmental Protection Agency). One of those risks, species extinction and the loss of biodiversity, is the handle by which the Endangered Species Act (ESA) grasps the underlying problem of habitat loss and modification. In its own words, the primary purpose of the act is "...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."

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The Science Advisory Board also recommended that pollution prevention, as opposed to end-of-the-pipe controls, should be the preferred means of reducing ecological and human health and welfare risks. End-of-the-pipe controls attempt to minimize the impact on the environment of some polluting activity that has already occurred. In the case of some air emissions, we require scrubbers that remove pollutants from the airborne waste stream. In the case of endangered species, we restrict human interference with the remnant of a species' habitat once the species has been determined to be endangered or threatened.

Pollution prevention, by contrast, seeks to minimize the amount of waste that accompanies the production of the goods and services our society wants. Preventing air pollution may mean burning cleaner fuels or using polluting inputs more efficiently. The analog of pollution prevention in an endangered species context will entail finding ways to minimize the conversion of natural habitats to human uses incompatible with species' survival.

Preventing conversion of endangered species habitat and the conservation of biodiversity in general is particularly difficult, because many of the values associated with biodiversity are, at least for the moment, "non-use" values. Some species today may be like the pacific yew of only a few years ago--of no immediate financial worth until improved information reveals a valuable way to use them to meet human needs. For these species, there is a tremendous value in preserving the possibility of future use. Other species may never be "used" in any direct way. Nevertheless, they do convey a value to society simply through their continued existence or the continued existence of the ecosystems that support them and of which they are a part. Such values are not represented in the market prices for other goods whose production may be incompatible with the conservation of biodiversity. Consequently, private decision makers will be unable to capture the public values of biodiversity conservation.

In short, biodiversity is a "public good". The benefit to any one person provided by biodiversity is not diminished when some other person receives those same benefits, and all members of society receive the same benefit whether they pay for biodiversity or not. The result is that beneficiaries of biodiversity have little incentive to pay for those benefits, and those who can affect the sustained provision of biodiversity's benefits are unable to profit from its conservation.

As with other public goods, including clean air and water, an educated public and national defense, it is reasonable to expect the government to directly provide a significant portion of needed biodiversity conservation. By keeping public lands in natural habitat, the federal government can help prevent species endangerment and shelter species already endangered. However, when nearly three quarters of the American landscape is privately owned and when half of all species already listed as threatened or endangered do not even occur on public lands, it is clear that we must look beyond the federal estate if our society is to maintain the public benefits of biodiversity. And because we cannot rely on market transactions to provide a sufficient level of biodiversity conservation on private lands, it is also reasonable that we consider mechanisms whereby the public benefits of biodiversity conservation can be incorporated into private decisions affecting endangered species and natural habitats.

Incentives to Preserve Endangered Species Habitat and Overall Biodiversity

There are three basic approaches for integrating the public values of biodiversity into the private financial calculus that underlies land use decisions: incentives, disincentives, and the creation of ownership rights in new markets. In addition, we need to examine and reform existing perverse incentives that are fueling the endangered species problem while simultaneously creating a financial drag on the public. I will discuss each briefly in turn and conclude with some observations on the need for an integrated federal policy for protecting the public good of biodiversity.

In the attached paper, we outline seven specific proposals for integrating the broad values of endangered species and biodiversity into the financial calculus of land ownership and management. These are:

Incentives

1. Federal tax credits for local property taxes on qualifying habitat.
2. Federal tax credits for qualifying habitat improvement or restoration.
3. Partial federal tax credits for ESA compliance expenditures.
4. Federal income tax deductions for revenues derived from lands managed to provide qualifying habitat.

Disincentives

5. Federal tax penalty for conversion of qualifying habitat.
6. Prohibition on the use of federal subsidies and tax benefits for activities causing loss or degradation of qualifying habitat.

Ownership Rights in Habitat Markets

7. Creating a market for development rights on qualifying habitat.

For each proposal, we provide a description, stipulations, the rationale, a qualitative assessment of transaction costs and a list of research questions and issues. Please refer to the paper for these details.

Today, I wish to emphasize several general points.

First, we are not recommending any of these options for adoption in the ESA at this time. Rather, we support the provisions contained in H.R. 2043 and S. 921 that require the government to study and assess the overall issue of incentives. We are providing these proposals as food for thought, and to suggest the full range of issues that such a study must consider. As you will see from our discussion of these proposals in the attached paper, there are major research questions that must be addressed before we can assess the equity, effectiveness, efficiency, and cost of these and other approaches.

Second, most of our proposals involve changes to the federal tax code that would encourage the conservation and discourage the conversion of essential habitat on private lands. We believe the federal tax code must be a central focus of any study of incentives for several reasons. The sheer reach of the tax code makes it one of the major structuring forces in our economy. Even if it is not used directly to promote the conservation of biodiversity, any study must consider the tax code's potential to blunt other measures designed to do so. Moreover, the tax code is less prone to the vagaries of the annual budget process. Recent disappointing experiences with existing conservation incentive programs having no funds appropriated for their implementation makes us leery of cash payment approaches. Finally, non-tax approaches may require expensive bureaucratic structures that are additive to the existing costs of collecting government revenues.

Third, we do not believe that the challenge of maintaining the public value of biodiversity on private lands can be met with a single "magic bullet". Rather, an effective program will require several reinforcing provisions. A few weak or poorly targeted incentives will only create an additional public liability without affecting the core of the problem. This further underscores the importance of a thorough and deliberate study.

Fourth and finally, we must be prepared to accept that a thorough consideration of the problem will reveal that the greatest utility of incentives and, especially, market approaches is in prevention of endangerment and not in the cure. Recent research (Wilcove, McMillan and Winston 1993) indicates that many species are listed at population sizes well below levels that are viable over the long-term. If these species are, like most, being listed due to habitat loss and that loss is due to irreversible land use changes, then we are creating a class of permanently endangered species. In such circumstances, additional losses of habitat are unacceptable and demand strong regulation. One cannot create a market in habitat development rights if there is no tradeable surplus.

Reforming Perverse Incentives

In developing new tools for promoting endangered species and biodiversity conservation, existing perverse incentives that are creating endangered species must not be overlooked. A forthcoming Wilderness Society report documents that 60% or more of currently listed species are at risk, at least in part, due to water development, recreation, grazing, logging, mining, or some combination of these activities (Losos 1993). When they occur on public lands, these activities frequently receive large subsidies from federal taxpayers. Although the exact contribution of the subsidy to species endangerment is not known, it is clear that federally-subsidized resource programs, such as timber sales and grazing, are significant causes of endangered species.

It is already well known that such subsidy programs are costing taxpayers in excess of a billion dollars a year in strict financial terms. To the extent that these subsidies are creating endangered species, the total economic loss is much higher. First, there are the additional financial costs incurred as part of the listing and recovery process. More importantly, there is the continued loss of the non-financial public values of biodiversity.

If Congress is seeking a way to materially affect the endangered species problem and be fiscally prudent at the same time, there is a golden opportunity to do so through reform of these wasteful federal resource subsidy programs. There are few occasions in life where we can have our cake and eat it too. This is one of them.

I would like to submit a copy of Dr. Losos' report for the record. We suggest that the Committee consider separate hearings to fully explore the implications of this information for effective implementation of the Endangered Species Act.

The Need for an Integrated Policy of Biodiversity Conservation

Endangered species are the most obvious symptom of the decay of ecosystem integrity and the loss of biodiversity. The ESA is our first effort at addressing the loss of biodiversity, and the task before it is enormous. Already, some 700 species have been listed as threatened or endangered. Recovery plans are in place for only about half of these listed species. Another 400 species are expected to be listed over the next four years, and some 3,000 species are candidates for listing.

Most of these species are at risk because of changes in land use that result in the degradation or conversion of their habitats. Because so many of these habitats lie on private lands, maintaining biodiversity will entail bringing biodiversity's broad values to bear on the economic decisions of individual land owners. If we fail to do so, we will continue to create endangered species and rob all of society of the values inherent in the public trust of biodiversity.

A well designed system of incentives, disincentives, and market mechanisms can begin to get at the heart of the problem, but only if they are integrated into an overall national policy on sustainable development. State efforts to provide rural landowners with tax breaks to maintain natural habitat can be undone by federal programs that upgrade transportation facilities that distort local land values and development patterns. Giving income tax deductions for sustainable grazing on private lands is incompatible with subsidizing unsustainable grazing on public lands.

We support the concept of exploring economic tools for promoting the conservation of endangered species and overall biodiversity. We have provided some specific suggestions for consideration. But we hope that Congress will use the study outlined in H.R. 2043 and S. 921 to conduct an examination of sufficient scope and scale to inform us on the outline of a truly effective national policy that can maintain the biodiversity common good.

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ECONOMIC INCENTIVES TO PRESERVE ENDANGERED SPECIES HABITAT AND BIODIVERSITY ON PRIVATE LANDS

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The Wilderness Society

PART I -- NEED AND RATIONALE FOR ECONOMIC INCENTIVES

The Endangered Species Act (ESA) can be considered an expression of the substantial biological and social value American society holds for endangered species. While our political system recognizes and manifests this value, our economic system does not. Moreover, our economic system is working at cross purposes to the Act and the societal values of biological conservation it represents. Some of the major causes of species endangerment in the United States include residential and commercial development, agricultural practices, timber management and resource extraction, and energy and water development (Flather, In Press). These economic activities can result in habitat loss or degradation, which invariably results in species endangerment, and then loss of biodiversity. It is a simple chain of events to understand, yet is a difficult cycle to influence.

Economic and market forces do not have to act counter to our national goal of endangered species preservation. These powerful forces can be realigned to work in tandem with our regulatory-based strategy to protect endangered species and biodiversity (Repetto 1992). A system of economic incentives, both positive and negative, can begin to translate the broader values of biological conservation into terms of prices. Economic activities that conserve or restore valuable biological habitats can be promoted and encouraged through lower costs or higher returns. Economic activities that destroy or degrade such habitats can be discouraged through higher costs or lower returns. In such an economic environment, the market can work for the conservation of important biological habitats by helping to bring equilibrium to a system out of balance. Those with valuable biological resources on their land can be rewarded and encouraged for developing innovative ways of integrating habitat preservation with sustainable economic activity.

Why does our economic system continue to work at cross purposes to the significant value[1] we, as individuals and a country, hold for our natural world? Because we continue to separate social values from economic decision making, and in so doing, leave out important chunks of the equation when we calculate the financial viability of our various economic endeavors. As a result, many types of development or extraction activities are undertaken that appear to make financial and economic sense, but that seriously harm the habitats supporting endangered species and overall biodiversity. Incorporating these social values into the calculus of project profitability, through terms of price, would mean having enough social and financial information with which to make fully informed decisions. A complete consideration of these broader values would probably render many such activities unprofitable. This is the lesson western ecological economists are teaching in the developing world; the short-term economic gain derived from clearing another 20 hectares of rainforest, or from converting another 5 hectares of elephant habitat to cash crops, may not make long-term economic or social sense (Swanson and Barbier 1992). Such a lesson is equally applicable in the economic arenas of our own backyards.

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[1] The concept of *total economic value* is a useful typology for identifying the several values society holds for natural resources. *Total economic value* is the sum of *use values* (consumption, direct non-consumptive enjoyment), *option values* (the desire to preserve resources for the enjoyment of future generations) and *existence values* (the satisfaction from knowing that biological resources such as blue whales and South

The use of economic incentives to motivate private parties to conserve important habitat on private lands becomes especially compelling when land ownership patterns and the distribution of endangered species in the United States are considered. Nearly 80% of U.S. lands (excluding Alaska) are privately owned or held by non-federal government entities. Roughly 95% of these lands are classified as rural and non-developed, some portion of which support habitat for biological resources at risk (Soil Conservation Service 1987). Of the 728 currently listed federal endangered and threatened species, approximately 50% are found only on private lands. Another 20% of these species have at least half of their known occurrences on private lands (Natural Heritage Data Center 1993). The distribution of the roughly 3,700 federal candidate species is not known, but may be assumed to follow roughly similar distribution patterns.

The problem is compounded further by the way private land is evaluated in the United States. Neoclassical economics texts continue to teach that the value of land is nothing more than revenue potential of its production capacity. The benchmark for land tax assessments is the "highest and best use" to which land can be put, which means determining the maximum likely revenue potential for each parcel of earth. The presence of endangered species habitat on private land is a liability that is scored in the debit column. Our task is to convert the tremendous value our society holds for endangered species and biodiversity into positive financial terms, so that these valuable biological resources will begin to be scored in the asset column (Repetto 1989).

Our goal is to develop a system of economic incentives and disincentives that will affect the countless marginal decisions and considerations that constitute our private economy. Will farmer Jones convert another 20 acres of open meadow to row crops? Will developer Smith add another 100 units of housing to her project in southern Arizona? In the absence of prices that convey the full social, ecological, and biological costs of these decisions, these landowners will choose alternatives that maximize their short-term financial returns at the expense of the long-term, inter-generational interests of our society. On the other hand, positive incentives such as property tax credits may make it

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American butterflies exist, even if they are never experienced directly) (Pearce 1990).

more financially attractive to conserve important habitats. Properly structured, the right system of incentives and disincentives would slow the rate of land conversion and development.

In other instances, tax incentives and disincentives will simply have no effect on project profitability. Coastal development projects in southern California or south Florida impacting large segments of endangered species habitat may be so financially profitable that they remain unaffected by all but the most extreme levels of positive or negative incentives. In these instances, the regulatory authority of the ESA is currently the only means of safeguarding important biological habitat. Such situations beg a deeper analysis of: 1) the economic decision framework in toto; 2) the myriad perverse incentives created by federal subsidies and tax considerations that promote consumption over conservation; and 3) the way government decisions on such basic necessities as roads and other infrastructure induce development that might not otherwise occur. Ultimately, the conservation of nature and the very character of the American landscape demand a coherent policy that steers development in the right direction. The opportunity exists now to better integrate our emerging sense of the broad values of natural habitat into our economic decision making.

In the following sections, we present a series of financial incentives, both positive and negative, that can begin to integrate the protection of natural habitats into private economic decision-making. Many of these ideas were drawn from work done in wetlands and farmlands preservation; fee and tax-based pollution control; and tradeable permitting. Together, they are intended to address a broad spectrum of economic agents: from the family farm to commodity interests to the land development sector.

For several reasons, many of the tools we describe rely on changes in federal tax policy. First, a centralized tax system serves as the mechanism needed to supplement the transfer of money - the proxy for value - among the various parties in our society and economy. It is vastly more efficient to distribute tax dollars to those landowners striving to integrate endangered species habitats into their economic ventures than it is for all concerned citizens to write checks to these landowners. Second, the federal tax code is used regularly to stimulate and shape investment and development decisions for many facets of our economy. Farm and timber production levels, manufacturing sectors, areas of technological research and development, and local economic development are just a few examples of the way tax credits, deductions, depreciation allowances and capital gains tax levels are used to guide economic activity in this country. Third, the federal tax code is a central locus that reaches all economic agents in the United States.

Our proposed economic incentives and disincentives are:

1. Property Tax Credits for Habitat Maintenance
2. Tax Credits for Habitat Improvement
3. Partial Tax Credits for ESA Compliance Expenditures

4. Income Tax Deductions for Revenue from Lands Managed to Support Endangered Species

5. Tax Penalties for Habitat Conversion

6. Prohibition on the Use of Federal Subsidies and Tax Benefits for Activities Causing Habitat Loss or Degradation

7. Creating a Market for Development Rights on Important Biological Habitat

These ideas come with several caveats. The first is that the government has the wherewithal to provide reliable information on what species and habitats are at risk and where they are. The second, and equally fundamental, is that the government have the will to enforce the law.

A third caveat is that these ideas, even if taken as a package, are not a substitute for a coherent federal policy to guide development in a sustainable fashion. They could, however, begin the evolution of such a policy.

PART II -- ECONOMIC INCENTIVES

Section 1. Tax Incentives and Disincentives

The following array of tax incentives and disincentives are intended to influence the many levels of economic decision making that result in the loss of biologically important habitat. Some are designed to provide a modest economic motivation for preserving land in its natural state; to cover the carrying costs for land threatened with damaging resource extraction or conversion to commercial or residential use. Others are designed to influence the deeper, structural investment and wealth maximization dynamics that drive a great deal of private sector economic behavior. To be effective, an economic incentive has to reach and appeal to the decision maker responsible for the particular activity affecting sensitive habitat areas, whether she works on the family farm or for a corporate timber operation with a million acres in holdings (Anderson 1991).

The opportunity costs of not extracting marketable resources or converting land to commercial or residential uses can be substantial. These tax incentives do not seek to bridge the considerable distance between status quo, land-based revenues and unrealized opportunity costs. They are intended as motivating incentives and economic signals, not as compensation for the effects of lawful and appropriate government regulation.

It should be noted that tax deductions and tax credits[2] shift the burden of cost of habitat preservation from the private sector to the public sector. They do not make these costs disappear. Given current federal budget constraints, the goal of any economic incentive program should be some modicum of revenue neutrality where moneys from the disincentives fund the various incentives. Because we are presenting more incentives than disincentives, this array of proposals probably falls short of the revenue neutrality goal. Without data on the acreage levels of private land supporting eligible habitat, or the number of private landowners who would decide to take advantage of the tax incentives, it is not possible to determine the extent of this revenue shortfall.

Substantial research on the costs of implementing and monitoring these various incentive programs (what we term "transaction costs") is needed to insure that they are a cost effective means of safeguarding important biological habitats.

Proposal 1 - PROPERTY TAX CREDITS FOR HABITAT MAINTENANCE

DESCRIPTION: Local and state property taxes paid on lands providing habitat for endangered species, candidate species and significant biodiversity would be offset by an annual federal tax credit. Such property taxes are already deductible from the federal income tax, but a tax credit in the amount of the allowable deduction would amplify the tax benefit so that qualifying lands would become completely exempt from property taxes.

STIPULATIONS: To qualify for the tax credit, land owners would develop a Land/Habitat Management Plan in cooperation with the FWS or a designated State of Local jurisdiction. To achieve the goal of long-term habitat protection, landowners would have to commit to the plans for lengthy time periods, say 10, 15 or 25 years, with a penalty for early termination.

RATIONALE: Property taxes can account for up to 25% of total operating costs in urban areas, 10% of costs in suburban areas, and 2% of such costs in rural areas (Wolf 1981). Reductions in property taxes are a widespread and accepted method for preserving farm and range lands, open space, and historic properties. For example, more than half the states use differential assessments, or related variations, to reduce the tax burden on lands kept in an open state (U.S. Department of Commerce 1989). Because of the tremendous increase in property assessment levels during the 1980's real estate boom, property tax credits could prove to be a positive inducement for private sector land preservation (Barton 1993). Such credits may be especially effective in the fringe areas of rapidly developing urban and suburban areas where assessed property values increase dramatically and where increasing numbers of plant and animal species are being listed as endangered or threatened.

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[2] Tax deductions are 1:1 reductions in taxable income from which the tax liability is determined. Tax credits are 1:1 reductions in tax liability, or actual amount of tax owed.

TRANSACTION COSTS: Several transaction costs need to be considered in order to further develop the idea for federal property tax credits:

- Species Location - Ground locations for endangered and threatened species habitat is generally imprecise and incomplete. Biological surveys would be needed in most instances to establish and delineate such habitats. Locational information for candidate species is even less available. As yet, there is no working definition of "significant habitat supporting biological diversity." A system for defining and prioritizing biodiversity-supporting lands must be developed before biodiversity-supporting lands could be made eligible for the tax credit program.[3]

- Acreage Quantification and Delineation - Land surveys to quantify and delineate eligible acreage would be needed.

- Management Plan Development - Plans would have to be developed by a qualified biologist or land planner. Staff and field time by FWS personnel would be required.

- Compliance Monitoring - Periodic monitoring would be needed to insure compliance with the plans' provisions.

RESEARCH QUESTIONS AND ISSUES: The key research questions are determining the amount of acreage eligible for such a credit program, and determining the effectiveness of this level of tax credit. The other key research question is determining the funding levels needed to enact such a credit program. Data needed to establish the tax credit levels include:

- Amount of privately held acreage supporting endangered species habitat.

- Number of private land owners holding title to land supporting endangered species habitat.

- Amount of local and state property taxes paid on private land supporting endangered species habitat.

- Tax rates on private lands supporting endangered species habitat.

Proposal 2 - TAX CREDITS FOR HABITAT IMPROVEMENT

DESCRIPTION: Federal tax credits for all expenses incurred in improving degraded habitat, or creating new habitat, for endangered, threatened and candidate species and for significant biodiversity. Restored and newly created habitat areas would then be eligible for the above described annual property tax credits. Bonus credits could be made available to those restoration efforts resulting in recolonization by previously extirpated endangered, threatened or candidate species.

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[3] A positive benefit from the tax credit program would be the data generated on species location and habitat types on private lands. As noted, such data is generally incomplete and imprecise.

STIPULATIONS: To qualify for the tax credit, land owners would have to develop a Habitat Restoration Plan in conjunction with the FWS or a designated State or Local jurisdiction. The mitigation work required by Federal or State permit requirements could also be eligible for these credits. Later conversion of restored lands to non-habitat uses would be penalized at a level equal to the aggregate tax benefits received for the restoration work.

RATIONALE: There is general agreement that there are no incentives to creating or improving endangered species habitat aside from landowner good will. The rigidity with which current ESA regulations treat returning or re-introduced populations actively discourages habitat restoration and creation efforts. A modest financial incentive coupled with regulatory reform could induce important restoration efforts.

TRANSACTION COSTS: Many of the transaction costs for these restoration credits would be similar to those for property tax credits.

- Habitat Restoration Plan - Plans would need to be developed with the involvement of a qualified biologist. Agency field and staff time would also be required.
- Monitoring - Monitoring would be needed to insure compliance with the specifications of the Restoration Plan and to verify approximate expenditure levels for compliance work.

RESEARCH QUESTIONS AND ISSUES: Funding levels and the probable number of interested landowners are difficult to estimate without more precise data on endangered species dispersal on private lands. A second issue concerns the regulatory treatment of those properties and landowners who are able to induce returning populations of endangered species. Current ESA legislation and regulation provides little consideration for landowner concerns about returning populations.

Proposal 3 - PARTIAL TAX CREDITS FOR ESA COMPLIANCE EXPENDITURES BY SMALL LANDOWNERS

DESCRIPTION: Federal tax credits for a percentage of the expenses incurred by small landowners complying with the ESA. Examples of compliance expenses include biological studies and field surveys, labor devoted to compliance, special equipment and construction methods, and fees paid by private landowners to participate in Habitat Conservation Plans (HCP). Specifically excluded are foregone revenues and unrealized opportunity costs.

STIPULATIONS: A ceiling cap on the total amount of tax credits, or limits to the types of expenses eligible for this credit, may be warranted because many of these expenses are simply passed on to consumers in the form of higher timber, commodity, energy or housing prices. Foregone revenues and unrealized opportunity costs would be specifically excluded from this credit because the government has the authority under its police powers to regulate economic activity without compensation provided some level of economic return from the land is retained.[4]

RATIONALE: The costs required to comply with the ESA can escalate quickly. Large and small landowners alike are required to conduct biological field studies, prepare permit applications, perform mitigation work and pay HCP in order to comply with both the section 7 consultation provisions or section 10(a) permitting requirements of the ESA. Many of these expenses already qualify as standard business deductions, or, as stated, can be passed on to customers. There is growing concern though that ESA compliance costs may be deterring some small landowners from fully participating in the existing regulatory processes designed to protect endangered species habitats. This concern is especially acute for HCP participants (Spear, FWS 1993). Compliance costs may also render appropriately designed and scaled economic activities unprofitable. Partial tax credits for ESA compliance expenditures targeted at small landowner may encourage them to participate more fully and willingly in the section 7 consultation process and in the local and regional level HCP planning processes required by section 10(a).

TRANSACTION COSTS: Distinguishing ESA compliance costs from other environmental planning or permit compliance costs may be difficult to ascertain and to verify. A working definition of a qualifying "small landowner" would have to be developed. The effective level for a partial tax credit would also have to be ascertained.

RESEARCH QUESTIONS: A basic data need is the annual aggregate amount spent by the private sector on compliance with the ESA. Such data is regularly compiled and published by the Council on Environmental Quality for pollution abatement costs. Research on the number of potentially qualifying small landowners, and the appropriate activities eligible for tax deduction is needed. The potential effectiveness of a partial tax credit in encouraging ESA compliance behavior is also warranted.

Proposal 4 - INCOME TAX DEDUCTIONS FOR REVENUE FROM LANDS MANAGED TO SUPPORT ENDANGERED SPECIES

DESCRIPTION: Revenues derived from economic activity on lands that are managed to fully and perpetually support endangered, threatened and candidate species would be deductible from the taxable earnings that qualify for federal income taxation. Examples of endangered species-compatible economic activity could include: 1) Radically modified timber management programs where the full ecological integrity of endangered species habitat was maintained during all aspects of the growing, harvest and reforestation cycles. Meeting the compatibility criteria might easily mean that as little as 10% or 15% of the marketable timber could be harvested, and that the use of herbicides and heavy mechanized equipment was sharply limited; 2) Substantially modified grazing or agricultural programs that sustained native biotic communities and ecosystems along with non-native livestock or crops; 3) Housing developments that were designed to incorporate and retain sensitive habitats; or 4) Privately managed recreation and hunting lands where fees were collected for wildlife viewing, recreation, or hunting access.

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[4] The 1992 U.S. Supreme Court decision in *Lucas v South Carolina Coastal Council* is the latest in a long string of Supreme Court decisions upholding this basic tenet of governmental regulatory authority.

STIPULATIONS: The qualifying economic activities would have to be fully compatible with the long-term survival of extant or recovering endangered species populations and have no significant, long-term negative effect on such populations or on the biological integrity of the ecosystems supporting such populations. Only those revenue stemming from economic activity on lands directly supporting endangered, threatened or candidate species habitat would be eligible. These qualifying activities would need to be described in an Endangered Species Compatibility Plan, which would include a land and habitat management component. The Plans could operate on a long-term basis (say 50 years or so), and would include substantial penalties, equal to the tax benefits received, in case of termination or conversion to non-compatible land uses. Revenues from one-time sales, as characterized by housing developments, would need to be considered differently (i.e., at a lower rate of deduction) than revenues from ongoing operations. The qualifying standards for this incentive program would have to be stringent to insure compatibility with the strict criteria required to maintain the long-term biological integrity of the involved ecosystems.

RATIONALE: No significant economic incentives for private land owners exist that reach the structural core of economic decision making. The key to the perpetual health and preservation of our biological resources lies in integrating habitat needs with appropriately scaled and sustainable economic activities. Such appropriately scaled economic ventures would by definition have lower rates of return on investment than non-sustainable ventures. Federal income tax deductions for compatible economic activity could serve as an initial boost, and then as a stable financial platform, for newly scaled, sustainable and habitat friendly industries and radically restructured existing industries (Repetto 1992).[5] Such deductions would operate on the same ecological economic principles that have spawned the increasingly successful sustainable commodity harvesting and game management programs in developing parts of the world (Rasker 1992, Swanson and Barbier 1992).

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[5] The utility industry provides a relevant example for how tax considerations can spur new areas of environmentally compatible development. In 1992, 6.6% of California's electrical generation capacity was supplied by non-traditional energy sources such as wind, solar and geothermal power (Edison Electric Institute 1993). The investment tax credits that helped spawn this nascent, sustainable segment of the utility industry have been scaled back, and renewable energy sources are approaching cost competitiveness with traditional generation sources. Despite tales of non-functional wind turbines and abuse of the tax credits, the combination of tax incentives and vigorous regulatory support from the California Public Utilities Commission resulted in this energy success story.

TRANSACTION COSTS: Substantial work would be needed to define and delineate "sustainable and compatible economic activity." Compatibility Plans would have to be developed in cooperation with qualified biologists. The program would need to be located within an agency capable of managing biological, land use and income generating activities. At present, no single agency appears capable of managing such a program. Regular, comprehensive and vigorous monitoring would be required to prevent the considerable temptation to abuse this type of program.

RESEARCH QUESTIONS AND ISSUES: The primary research issue is how to delineate qualifying activities. Guidelines would need to be strict and precise so that only those economic activities that are fully compatible with the long-term viability of endangered species populations and the ecosystems that sustain them would qualify. A second research area would be to determine the program costs, monitoring protocols, potential administering agencies, and potential effectiveness of this incentive program to sustain critically important habitats. A key issue would be building safeguards against abuses or other unintended consequences. Research into the cost effectiveness of this incentive may show that the transaction costs outweigh the benefits of attempting to integrate appropriately scaled economic activity with the perpetual health of endangered species populations.

Proposal 5 - TAX PENALTY FOR HABITAT CONVERSION

DESCRIPTION: A federal tax penalty, or severance tax, would be levied on lands converted to uses not compatible with the support of endangered, threatened and candidate species, or significant biodiversity habitat. The penalty would be a per acre tax (probably in the range of hundreds to thousands of dollars per acre). Moneys from the tax penalty would help fund the various incentive programs described above.

STIPULATION: The tax penalty would apply to land use conversions or economic activities resulting in the elimination or substantial degradation of endangered, threatened and candidate species and significant biodiversity habitat. Such a penalty could be progressively structured so that the most sensitive and biologically valuable habitat would carry the most severe tax.

RATIONALE: The concept for a tax penalty is founded in the mature body of work on pollution fees and taxes (Pearce 1990, Baumol and Oates 1988) designed to reflect the external, social costs of economic activity. Just as pollution fees charge polluters for the use of clean air, water and soil, a penalty tax would charge land users for the 'clean,' habitat-supporting land they use. Pollution fees are an increasingly common pollution control device in Europe (Shaw 1991).

TRANSACTION COSTS: A progressive tax penalty for habitat conversion would require the development of a variable rate tax structure reflecting the biological value of the various habitats. Lands to be converted would have to be assessed for their habitat type and quality, and acreage delineations would have to be conducted. This could entail National Environmental Policy Act (NEPA) type reporting requirements for all levels of land use changes (as is required by California's Environmental Quality Act). A monitoring and penalty system would also have to be established to insure compliance.

RESEARCH QUESTIONS AND ISSUES: The primary research need is for a comprehensive biological survey on private lands. Existing information on endangered and threatened species population locations on private lands is imprecise and incomplete. The knowledge curve drops sharply for locational information on candidate species and habitat supporting significant biodiversity. The annual conversion rate of habitat-supporting private lands is unknown. Research on establishing appropriate taxation levels is also needed.

Section 2. Eliminating Perverse Incentives

Perverse incentives are those financial and regulatory inducements that lead to a loss and degradation of habitat for endangered species and significant biodiversity. Examples include the pre-1985 USDA subsidy to farmers for drainage and conversion of wetlands to agricultural land, subsidized federal timber sales, price supports to sugar farmers that result in habitat loss and pollution in Florida, and below cost grazing fees that encourage the use of federal lands that may be better suited for other uses. Losos (In Preparation) documents that perverse incentives often result in habitat loss that then requires the expensive protection of the ESA.

Proposal 6 - PROHIBITION ON THE USE OF FEDERAL SUBSIDIES AND TAX BENEFITS FOR ACTIVITIES CAUSING THE LOSS OR DEGRADATION OF ENDANGERED SPECIES HABITAT

DESCRIPTION: Private parties who enjoy direct and indirect federal subsidies, price-supports and tax considerations would be denied the use of such subsidies for activities that eliminate or degrade habitat for endangered, threatened and candidate species and for significant biodiversity. Concurrently, all private parties enjoying direct and indirect federal subsidies would be required to inventory their lands for endangered, threatened and candidate species habitat and to develop management plans for such habitat. Examples of direct and indirect federal subsidies include federal price supports for crops and commodities, federally subsidized water and energy, and the aforementioned subsidized federal timber program.

A variation on this prohibition would be to deny standard business expense deductions, depreciation allowances, and investment tax credits to economic agents when these deductions and credits foster loss or degradation of biologically significant habitat (Dennis 1985).

RATIONALE: Federal subsidies and tax benefits can be powerful motivators of economic activity. As such, they could be an equally powerful lever to discourage environmentally destructive activities. The enjoyment of federal financial resources for private gain should require a responsibility to work towards a goal of national importance: the preservation of the nation's biodiversity resources.

TRANSACTION COSTS: Those federal agencies furnishing subsidies would be required to track and monitor their use to insure that habitat for endangered species and significant biodiversity was not being destroyed or degraded. Private parties enjoying federal subsidies would be required to document compliance with the prohibition on their use in activities causing habitat loss and degradations. Conducting habitat inventories and developing management plans would require the use of qualified biologists and land managers, and would require agency assessment and approval.

RESEARCH QUESTIONS AND ISSUES: The first research need is to further identify and document the many direct and indirect federal subsidies contributing to habitat loss and degradation. A second research need is to determine how far back in the subsidy chain these prohibitions should apply. For example, some municipalities in Western states have access to water from federal water projects. Should use of this subsidized water be denied to municipalities whose zoning practices encourage patterns of residential and commercial growth that obliterate endangered species habitat?

Section 3. The Free Market Approach

Free markets hold tremendous potential to accurately and efficiently price and allocate scarce resources (Anderson 1991). But the applicability of free market approaches to the endangered species issue may be severely limited by the very scarcity that threatened or endangered species status implies. To work, a market requires both a clearly defined good or service, and a sufficient quantity of this good or surplus to interest some critical mass of traders. The FWS' delineation of critical habitat satisfies the first market requirement, but by definition, endangered, and perhaps threatened status, implies that no further loss of habitat is acceptable if the species chances for survival and recovery are to be maximized. Because a large number of species have been listed at population levels far too small to assure long-term viability, the opportunity has probably been missed to use habitat development rights as a tool for endangered species conservation. However, should the ESA take on a more aggressive and proactive thrust to conserve biodiversity overall, as through ecosystem management, free-market approaches may prove effective in preventing future endangerment.

The following proposal sketches the framework for a program of tradeable development rights. The long-range goal would be to establish a tradeable permit program that targets habitats for candidate species and overall biodiversity. A proper application of marketable development rights for these habitats could insure that they are used wisely and efficiently, with the result being that candidate species do not become endangered species, and that an effective tool is created that will help us keep ahead of the endangerment curve.

Proposal 7 - CREATING A MARKET FOR DEVELOPMENT RIGHTS ON IMPORTANT BIOLOGICAL HABITAT

DESCRIPTION: As with mineral rights, water rights, easements and tradeable pollution permits, development rights on private property that supports important biological habitat can be disaggregated from the original land base and traded freely on the open market. In this instance, owners of land providing habitat would be allowed to trade or sell rights to development. Both development and non-development interests would be eligible to buy these development rights.

To instigate this type of system, the FWS would have to make the initial allocation of rights by determining how much of the particular habitats for candidate species and other qualifying ecosystems would be eligible for development, and then distributing those rights among existing private land owners on a proportional basis. For example, if the FWS determined that 15% of Habitat A was eligible for development, each landowner of Habitat A would be authorized to develop up to 15% of the habitat on land they own. The FWS determinations on the amount of habitat eligible for development would be based on sound biological and ecological data on the amount of habitat required to sustain and maintain candidate species and overall biodiversity.

STIPULATIONS: The initial FWS determination on how much of each habitat type would be eligible for development would be firm, unless new habitat acreages were created. Those parties seeking to develop more of their land than for which they hold development rights would be obligated to obtain additional rights from other parties. For example, if Developer A's property contains 40 acres of a certain habitat and she wants to convert more than her 15% allocation, she would have to buy the requisite development rights from other landowners. Such development rights could be held and purchased by any interested party. Landowners creating new habitat would be eligible to market or exercise their development rights on a 1:3 or 1:2 ratio (i.e., one unit of development rights per three or two units of created habitat).

RATIONALE: Markets tend to work efficiently in determining resource allocations because the best use of a scarce resource is matched with the greatest need, as reflected in the price a party is willing to pay for the use of that resource. The right to destroy or degrade important habitat is extraordinarily valuable. Creating a market for these rights would allow their full economic value to be realized, and could help insure that a scarce and valuable resource would be used in society's best interests. A market in habitat development rights could be plausible and effective because: 1) such rights are a scarce and extremely valuable resource; and 2) the right, or amount of habitat to be traded, would be sharply defined by the FWS during the initial allocation.

Precedent for this type of government action is widespread. The federal government regularly defines quota levels; from the amount of clean air that can be used up or dirtied, to the amount of various crops and commodities eligible for price supports, to the amount of ocean going fish that can be harvested, to the amount of endangered species habitat that can developed, as is done during the HCP planning process. Tradeable development and use rights are being used by the Environmental Protection

Agency in dirty air basins, by the Bureau of Reclamation for rights to federal water, and by county governments to control housing density levels.

Benefits from a market in habitat development rights would be shared amongst private land owners, overall biodiversity, and society in general:

- Private land owners would benefit from such a program because a portion of their lands containing important habitat would be imbued with financial value, rather than being a nuisance and a constraint.
- Development patterns would improve because the scarcity of development rights would cause land to be used more efficiently. Nominally profitable ventures causing habitat destruction would be rendered unprofitable.
- Perhaps most importantly, overall biodiversity would benefit because the amount of habitat authorized to be destroyed would be clearly defined and capped. The continual incremental losses of habitat currently sanctioned by the FWS, through less than obvious criteria, would be halted. Endangered species would also benefit because a powerful incentive to create new habitat would be introduced.

TRANSACTION COSTS: The costs for establishing markets in tradeable rights can be high (Friedman 1984). The primary cost source would be the substantial ecological research needed to determine viable habitat amounts. A bureaucratic mechanism to distribute and monitor the allowable development rights would have to be created. Field surveys to establish habitat size and unit value on each involved private parcel would have to be conducted. Enhanced monitoring and enforcement of habitat destroying or degrading activities would also be required.

RESEARCH QUESTIONS AND ISSUES: Despite the theoretical soundness and allure of tradeable development and pollution rights (See generally Coase 1960 and Dales 1968), their effectiveness in pollution control has not been proven (Oates 1990). Marketing of water rights in the western U.S. though appears both feasible, effective, and increasingly popular. Scrutiny of EPA's tradeable permit program and water marketing are needed to better understand how to create an effective and efficient development rights market for habitat. Legal research to establish that the granting of development rights on a portion of private property does not constitute a regulatory taking of the development rights for the remainder of the property may also be prudent.

PART III -- CONCLUSIONS, AND THE NEED FOR AN INTEGRATED POLICY

The seven incentives, disincentives and market preservation mechanisms presented here are intended to illustrate economic tools that could address many of the causes of habitat loss on private lands in the United States. They are a series of economic messages to private land owners that convey more fully the value of the biological habitat they may own. The combination of regulatory prohibitions and correct price information could more effectively guide private landowners to make appropriate and socially beneficial decisions about the way they use their lands that support habitat for endangered and imperiled species. In those cases where development and conversion of habitat are appropriate, landowners will face and pay higher prices. In those instances where habitat conversion is not appropriate, landowners will be able to receive some economic return on their property.

Obviously, these proposals are conceptual. They are presented for consideration by the private sector, the environmental community, and regulatory and legislative officials. While versions and variations of nearly all these proposals are being used for different land preservation and pollution control purposes in the United States and Europe, additional research is needed to determine their potential utility. The habitat locations, requirements and extant population sizes for endangered, threatened, candidate and imperiled plant and animal species on private lands needs to be better established. The National Biological Survey should provide this vital information in the next five to ten years. Research on the program costs, transaction costs and efficiency of these proposals is also needed. Our goal is to stimulate thinking and discourse, and begin developing another set of policy tools to use in preserving and restoring this country's biological heritage.

Preserving the flora and fauna that characterize the American landscape, and the evolutionary processes that created them, will require an attitudinal shift in the way we value and use land. As we discovered with clean air, water, timber and oil, land is not an inexhaustible resource. It provides invaluable functions for many aspects of human society, and for the natural world that weaves through and supports our society. As it becomes more scarce, its use will have to be better allocated so that it is truly put "to the highest and best use," in the broadest sense of that phrase. Powerful legislation, such as the ESA, is one way to guide and control the use of land. Government acquisition is a very effective, albeit expensive, method for insuring that land is put to desired conservation uses. A third method is to use economic forces and prices to guide human behavior in determining the proper uses for land. None of these methods has proven singularly capable of attaining the right mix of economic development and biological preservation. A national policy that integrates these methods seems an inherently rational and much needed approach to insuring sustainable economic and biological health.

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TESTIMONY OF

ROBERT THORNTON

NOSSAMAN, GUTHNER, KNOX & ELLIOTT

BEFORE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

COMMITTEE ON MERCHANT MARINE AND FISHERIES

REGARDING

INCENTIVES FOR PRIVATE LANDOWNERS UNDER THE ENDANGERED SPECIES ACT

October 13, 1993

Washington, D.C.

Mr. Chairman and Members of the Committee:

My name is Robert Thornton. I am a partner with the law firm of Nossaman, Guthner, Knox & Elliott in Irvine, California. I welcome the opportunity to testify concerning the need to provide positive incentives to private landowners to protect endangered species and their habitat.[1]

I come at this issue as someone who worked on the Endangered Species Act ("ESA") as Counsel to this Subcommittee, who originally advocated the enactment of the habitat conservation plan provisions of the ESA, who worked on the first HCP (San Bruno Mountain) and who, over the last decade, has worked on eight other habitat conservation plans for local and regional agencies, private landowners and developers.

My views on this issue are driven by following considerations:

1. It is estimated that 50 percent of the currently listed endangered species in the United States occur only on private hands.[2] This percentage is likely to grow as the hundreds of pending proposed and candidate species are added to the list. This problem, or challenge, is graphically illustrated on the attached figures from the California Natural Diversity Data Base. Endangered and threatened species are found in every county in California.[3] The California Nature Conservancy estimates

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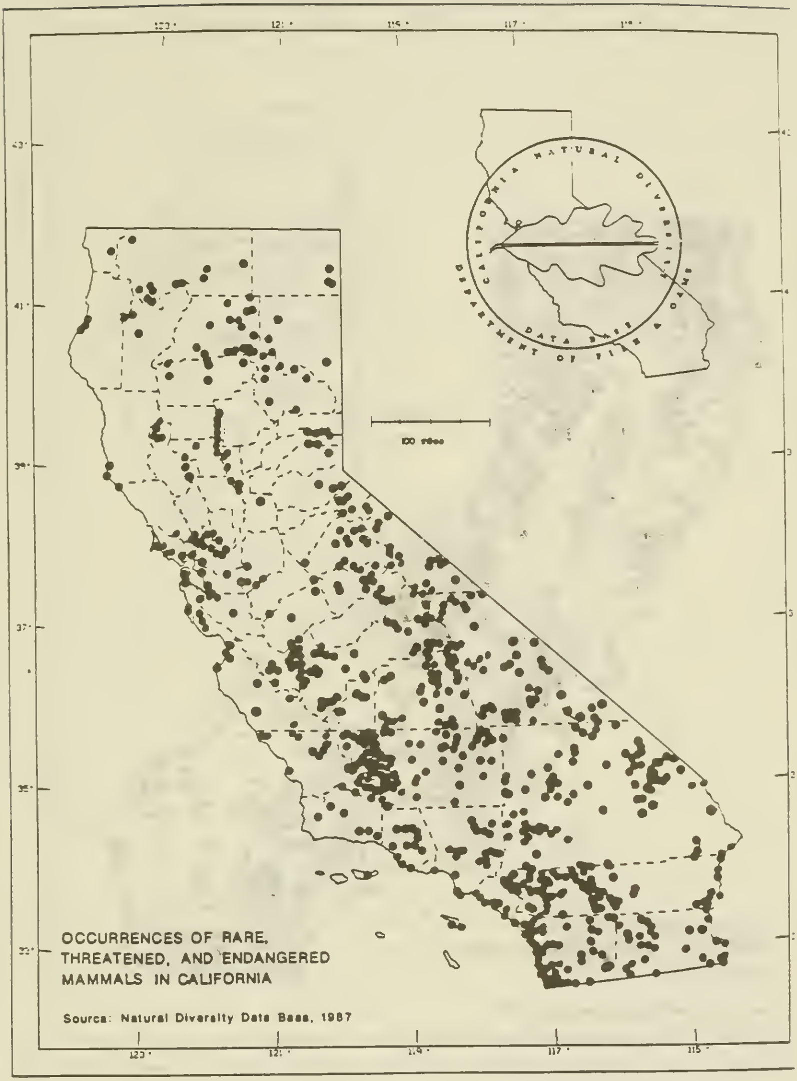
[1] This testimony is based on Olson, Murphy & Thornton, "The Habitat Transaction Method: A Proposal for Creating Tradable Credits In Endangered Species Habitat" in Building Economic Incentives Into the Endangered Species Act (attached). I want to especially acknowledge the contributions of Todd Olson of Olson Policy Consulting for his creative efforts in the formation and development of the Habitat Transaction Method.

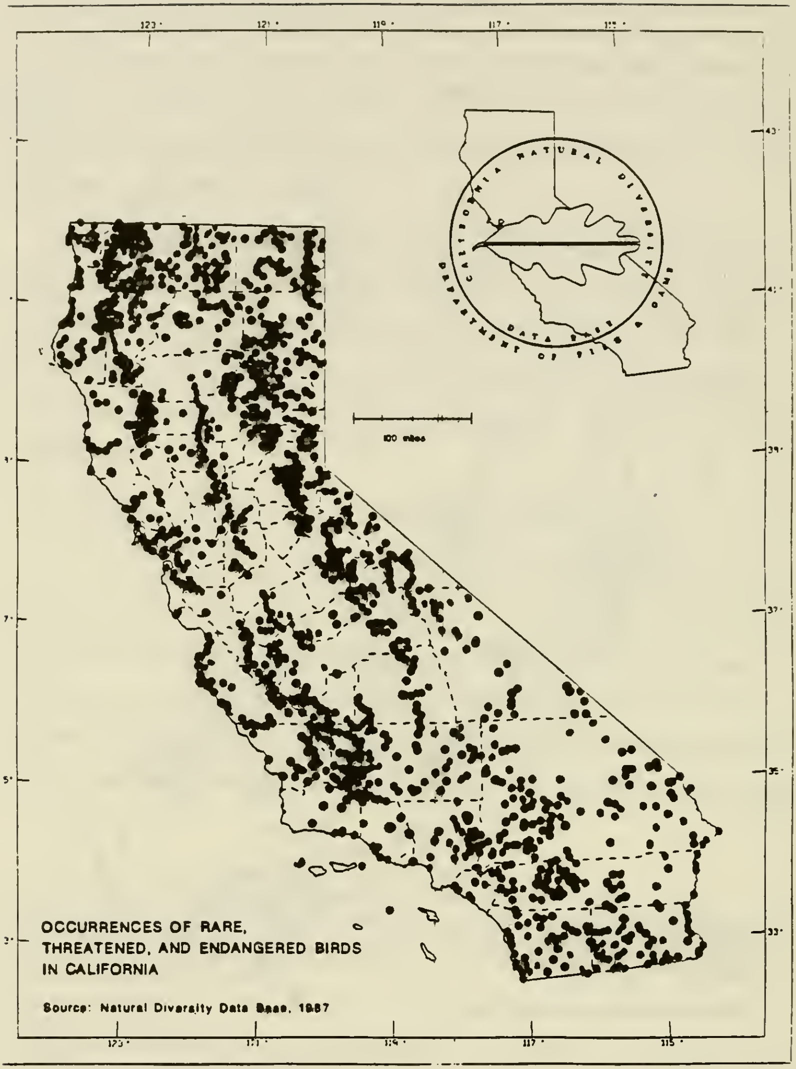
[2] McKinney, Shaffer & Olson, "Economic Incentives to Preserve Endangered Species Habitat and Biodiversity on Private Lands.

[3] The Figures only show the known occurrences of rare, threatened and endangered species listed in the California Natural Diversity Data Base.



OCCURRENCES OF RARE, THREATENED, AND ENDANGERED MAMMALS IN CALIFORNIA

Source: Natural Diversity Data Base, 1987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37°
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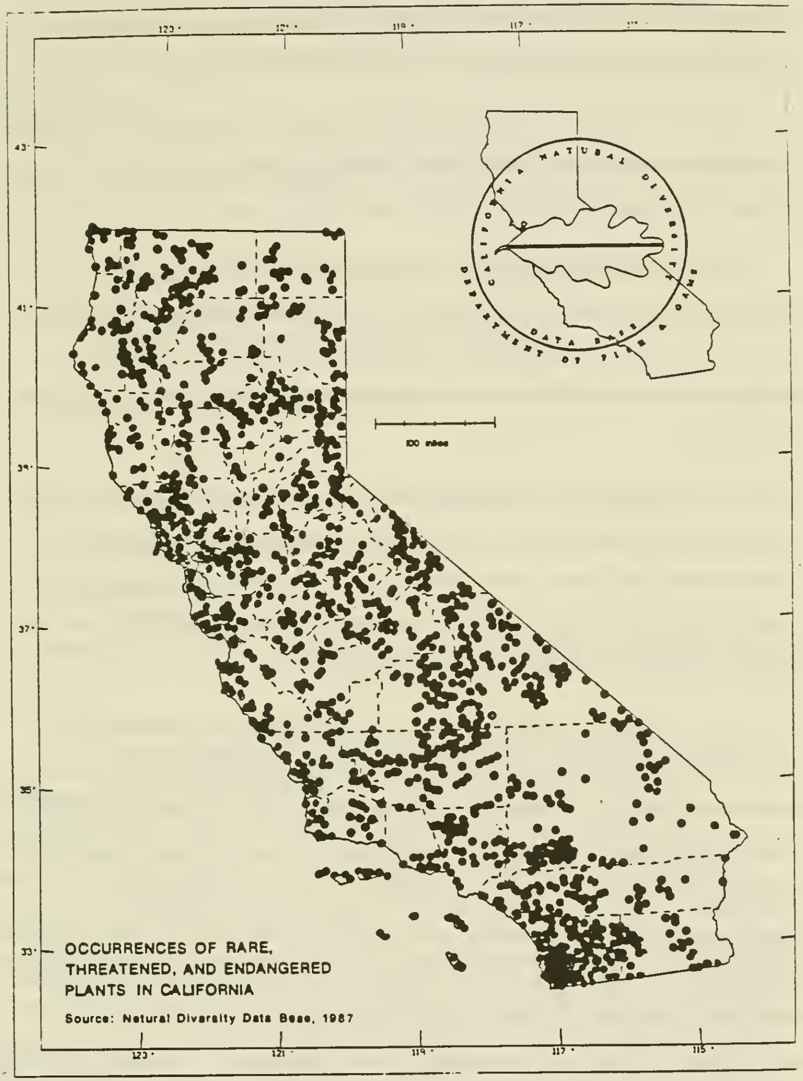
100 miles
CALIFORNIA NATURAL DIVERSITY DATA BASE
DEPARTMENT OF FISH & GAME

OCCURRENCES OF RARE, THREATENED, AND ENDANGERED BIRDS IN CALIFORNIA

Source: Natural Diversity Data Base, 1987


123°
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100 miles
CALIFORNIA NATURAL DIVERSITY DATA BASE
DEPARTMENT OF FISH & GAME

OCCURRENCES OF RARE,
THREATENED, AND ENDANGERED
PLANTS IN CALIFORNIA

Source: Natural Diversity Data Base, 1987

that 43 percent of all documented occurrences of California's threatened plants, animals, and natural communities are on private land.[4]

2. Unless local, state and federal governments are prepared to acquire this property, the conservation of this habitat will require an accommodation with the private landowners.

3. The ESA includes more than enough "sticks" to force private landowners to minimize or avoid impacts on listed endangered species. What the ESA lacks are positive incentives to encourage private landowners to protect endangered species -- and to do so before a species is formally listed as endangered or threatened.

4. Although Section 10(a) of the ESA has stimulated a number of HCP's, and lofty rhetoric about "historic" and "model" collaborative planning between environmental and developmental interests, the reality of the HCP process is not living up to this rhetoric. The hard fact is that only a handful of HCP's have been approved since the enactment of Section 10(a) in 1982.

5. Most of the approved HCP's have involved a small number of landowners and have been based on the conservation of habitat in preservation zones in exchange for permission to develop lands in development zones. The preservation program is typically financed either by direct exchanges of land for permission to take habitat, or by fees charged when land is developed in development zones, which are then used to acquire land in the preservation zones. This approach works well as long as the owners of land within preservation zones are willing participants. In the case of the one continuing HCP in which the preservation zone includes thousands of private landowners -- the short-term HCP

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[4] Sliding Toward Extinction: The State of California's Natural Heritage, 1987, p. 43.

for the Stephens' kangaroo rate in western Riverside County, California -- many of the landowners in the preservation zone do not see any benefits from the HCP, and therefore oppose it.

6. A landowner seeking to address endangered species issues on his property today faces a number of significant obstacles including:

(i) No governmental funding to assist in the development of the HCP;

(ii) A lengthy, complex and costly permit process;

(iii) Overlapping and conflicting state and federal regulatory requirements; and

(iv) No legal assurance that once an HCP is approved, other species will not be listed and subject the landowner to additional regulatory requirements.

Given these obstacles, it is no wonder that so few HCPs have been prepared in the last decade.

7. A major challenge for the ESA lies in the new wave of HCPs that are attempting to deal with multiple listed and unlisted species on hundreds of thousands of acres of land. Such efforts include multiple-species plans being developed in Kern, Riverside, and San Diego Counties to offer a few prominent examples from southern California alone. The Natural Community Conservation Plan for the California gnatcatcher and other coastal sage scrub species is attempting to address 575,000 acres of coastal sage scrub in three counties. There are thousands of landowners in the planning area ranging from the owners of single lots to very large land development companies. When a large number of landowner and

agencies are involved in a HCP, it becomes extremely difficult to reach agreement on what property is to be developed and what is to be preserved. In such situations, the typical approach of negotiating to designate development and preservation zones will not work unless public agencies are prepared to compensate all landowners within the preservation zone at fair market value (without deducting for the constraints imposed by the ESA) – a solution that is not economically or politically practical.[5] New approaches are needed.

A Multiple Landowner Solution: The Habitat Transaction Method

The Habitat Transaction Method relies on the efficiency and creativity of the marketplace, rather than a command and control planning system, to insure the conservation and enhancement of natural resources. Under the Habitat Transaction Method, landowners are allowed to realize economic value from the conservation and enhancement of that habitat. Landowners obtain "conservation credits" by preserving or enhancing habitat and then sell those credits to developers as mitigation for impacts on wildlife habitat. Using this approach, an HCP reserve system would emerge from the market-based transactions rather than the planning deals that have been the hallmark of the HCP process to date.

Under the Habitat Transaction Method, conservation objectives are not expressed in terms of the preservation of specific parcels of land, but rather in terms of overall habitat preservation which constitutes "conservation value" sufficient to sustain species and/or population addressed by the HCP.

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[5] The problems of the existing HCP process are described in greater detail in Thornton, "Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973", 21 *Environmental Law* 605-656 (1991).

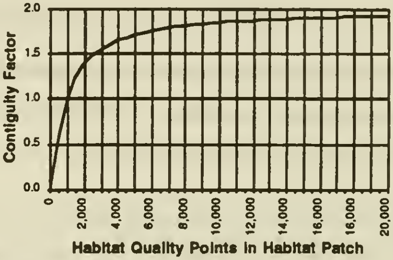
A process is established for measuring conservation value of all the land in the planning area covered by the HCP, expressed in terms of standardized "conservation units". Any landowner who agrees to conserve or restore habitat within the planning area receives credits based on the conservation value that the landowner adds to the reserve system. Any landowner proposing a project that would cause a loss of conservation value is required first to offer a number of credits based on the decrease in conservation value that would result from the development. Landowners who receive credits from conservation actions may either use the credits to develop elsewhere within the planning area or sell the credits to any other landowner who needs credits to compensate for project impacts.

Demand for development thus creates a corresponding demand for conservation. Resulting conservation activities will create a reserve system that should meet pre-established conservation objectives.

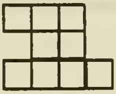
In its simplest form, the habitat transaction method is no different than the emission trading programs that have developed under the Clean Air Act. There is an important difference between air and habitat, however. Air is relatively fungible. All habitat, in contrast, is not created equal. The conservation value of a particular parcel depends on its relationship to habitat on adjacent property, and to the extent that the adjacent habitat is protected. Any effective market-based system has to be structured to address this issue and to encourage transactions that will achieve the desired conservation objectives.

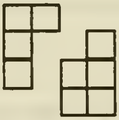
A relatively simple definition of "conservation value" for a particular habitat type is developed using a scheme similar to the following: First, habitat quality points are assigned to habitat areas with a range of values between 0.0 and 1.0 points per acre, based upon the extent to which the land is characteristic of the subject habitat type. Points are assigned based on such factors as soils types, slope and aspect, elevation, presence or absence of indicator species etc. The point system can then be used to make a rough habitat quality map of the planning area.

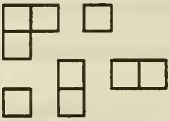
Second, the habitat quality points are adjusted based upon the size and contiguity of the patches of habitat in the planning area. The contiguity adjustment is based on how extensively the patches of habitat are connected in contiguous areas. The following curve illustrates how the point value of a particular parcel would increases or decrease depending on the size and quality of the habitat patch that the parcel is part of.



The effect of applying the contiguity factor is to devalue fragmented habitat and assign higher value to connected habitat. This effect is illustrated by applying the factor to the following three configurations in which each square has 200 habitat quality points.


1,800 Pts Pre-Adjusted.
2,376 Pts Contiguity-Adjusted


1,800 Pts Pre-Adjusted
1,696 Pts Contiguity-Adjusted


1,800 Pre-Adjusted
888 Pts Contiguity-Adjusted

Habitat values could be further adjusted based upon the overall configuration or shape of the habitat patches. The "rounder" the configuration, the higher the shape factor; the more linear or irregular the configuration, the lower the shape factor. Adjusting the conservation value of a particular habitat area in this fashion will tend to encourage the formation of reserves that minimize edge effects.

Since the Habitat Transaction Method provides that landowners will receive credits, or will be required to pay credits based upon the definition of conservation value, they will have a strong incentive to cooperate with adjacent landowners to protect land in configurations and shapes with long-term conservation value and, conversely, to avoid actions that would significantly diminish long-term conservation value.

Market-based approaches to habitat conservation planning are now under consideration in several HCP efforts in California. The Riverside County Habitat Conservation Agency has engaged Todd Olson of Olson Policy Consulting to develop a market-based approach to the Stephens' kangaroo rat HCP. In Kern County, the Western States Petroleum Association has proposed that the Kern County Valley Floor HCP include a version of the Habitat Transaction Method.

Advantages of the Habitat Transaction Method.

The Habitat Transaction Method provides numerous advantages from both a conservation standpoint and a private property standpoint, particularly when numerous private landowners are included in an HCP. These advantages include the following:

1. **The Habitat Transaction Method is based on sound biology.** A planning process using the Habitat Transaction Method explicitly acknowledges the biological requirements of the species to be protected and expresses them as quantifiable objectives.

2. **The Habitat Transaction Method** assures that a cohesive reserve system results. By defining conservation units to take into account such considerations as reserve shape and connectivity, a cohesive reserve system is assured. Disincentives are included for actions that could fragment or unlink important habitat areas.

3. **Landowners have incentives to enhance reserves.** Landowners are rewarded for enhancing the reserve system by voluntarily conserving parcels of high conservation value. The greatest incentives are offered to those with habitat that exists in larger, contiguous blocks, or linkages between patches of conserved habitat. Rather than competing with their neighbors to eliminate habitat and preserve economic value, this system would provide an incentive to neighboring landowners to cooperate to conserve habitat and thereby increase the economic value of their property.

4. **Efficient means of mitigation are provided.** Landowners desiring to pursue projects that result in take of habitat have an efficient means of doing so -- by either setting aside land of sufficient conservation value, or by purchasing credits from others who have set aside habitat of sufficient conservation value.

5. **Valuable habitat translates to economic value.** Landowners with valuable habitat on their land can realize the fair-market value of that land as habitat; the higher the habitat value of land, the more credits a landowner will receive for conserving it.

6. **Landowners control their own destiny.** Landowners are not forced to conserve land, nor are they prohibited from developing land. The can

make their own economic choices to maximize profits in the context of the conservation credit system. If landowners choose to develop their property, they are provided an incentive to minimize the effect of the development on existing habitat areas, and are provided a strong disincentive to develop the property in a manner that breaks a corridor between habitat areas.

LEGISLATION IS NEEDED TO PROMOTE THE USE OF THE HABITAT TRANSACTION METHOD

The experience of the last decade has taught us that some changes in the ESA are necessary if "economic train wrecks" are to be avoided.

1. **Authorize Pre-Listing Permits.** First, Section 10(a) should be amended to specifically authorize the issuance of a permits for species addressed in a HCP before the species is listed. The Conference Report to the 1982 ESA Amendments strongly suggested that this was intent of Congress[6], but the Fish and Wildlife Service has interpreted Section 10(a) to require a new permit application each time an unlisted species becomes listed -- even when the species was specifically addressed in the HCP. This change to Section 10(a) will assist all HCP efforts, whether or not the HCP utilizes the Habitat Transaction Method. Landowners are very reluctant to dedicate land for conservation purposes, and otherwise to make the large economic commitment required by any significant HCP effort, unless they

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[6] The conference report to the 1982 amendments stated the following:

> In enacting the Endangered Species Act, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the Act focus on species that are formally listed as endangered or threatened, the purposes and policies of the Act are far broader than simply providing for the conservation of individual species or individual members of listed species.
>
> . . . The conservation plan will implement the broader purposes of [the Act] and allow unlisted species to be addressed in the plan.

H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 30.

can receive legally binding assurances from the regulatory agencies that the future listing of unlisted species will not impose additional regulatory burdens on the development of the property beyond the restrictions imposed through the HCP.

2. **Fixed Time Periods To Respond To HCP Applications.** Section 10(a) should provide for fixed time periods within which the Secretary must respond to applications for Section 10(a) permits, and should require the Secretary to propose reasonable and prudent alternatives if the application is denied. The time periods on Section 7 consultations have worked well. Although the agency does not always meet the deadlines, they serve to promote efficient decision-making.

There are also certain changes to the tax laws that would promote the use of the Habitat Transaction Method and other market-based techniques:

Clarify that receipt of credits is not a taxable event. The receipt of tradable credits for granting land or restricting land use for conservation purposes should not be treated as a taxable event until such time that the credits are sold or traded for value.

Provide a capital gains exclusion for land transfers that facilitate conservation. A significant percentage of any long-term capital gain resulting from granting land or restricting land use for conservation should be excluded from income. This provision would give landowners who have held land for long periods of time, and who would realize a large gain upon selling their land, a strong incentive to provide the land for conservation in exchange for cash or credits.

Provide for deferred recognition of gain from land transfers that facilitate conservation. A landowner who receives compensation for selling land or restricting land use for conservation purposes should be allowed to reinvest the proceeds of the sale in a new real estate investment, and defer recognition of a taxable gain until the sale of the new investment under the "involuntary conversion" provisions of Section 1033 of the Internal Revenue Code. This incentive would provide additional incentives to private landowners to conserve land rather than develop it.

3

THE HABITAT TRANSACTION METHOD: A PROPOSAL FOR CREATING TRADABLE CREDITS IN ENDANGERED SPECIES HABITAT

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Section 10(a) of the Endangered Species Act (ESA) provides the only direct means for private parties to obtain federal permits to "take" endangered or threatened species incidentally to otherwise lawful activities. The Secretary of Interior issues such take permits if an applicant offers to implement a habitat conservation plan (HCP) that the Secretary finds to be in compliance with the standards set forth in Section 10(a) of the ESA.

Only a handful of Section 10(a) permits have been issued since the introduction of Section 10(a) into the ESA in 1982. In most cases, the HCPs on which those permits have been based have involved a small number of landowners and have been based on the conservation of habitat in preservation zones in exchange for permission to develop lands in development zones. The preservation program is typically financed either by direct exchanges of land for permission to take habitat, or by fees charged when land is developed in development zones, which are then used to acquire land in preservation zones.

This approach works well as long as the owners of land within preservation zones are willing participants. In the case of the one continuing HCP in which the preservation zone includes thousands of private landowners—the short-term HCP for the Stephens' kangaroo rat in western Riverside County, California—many of the landowners in the preservation zone do not see any benefits from the HCP, and hence, oppose it. As a result, those administering that plan now seek an alternative to the strict designation of preservation zones for purposes of the long-term HCP currently under development.

A challenge for the ESA and for those who implement it is coming in a new wave of HCPs that deal with multiple listed and unlisted species and, like the Stephens' kangaroo rat HCP, large numbers of landowners. Such efforts include multiple-species plans being developed in Kern, Riverside, and San Diego counties, to offer a few prominent examples from southern California alone. Many of the plans to be developed under the Natural Communities Conservation Planning process for the California gnatcatcher and coastal sage scrub habitat will be in this category as well. In such situations, the typical approach of negotiating to designate development and preservation zones will not succeed unless public agencies are prepared to compensate all landowners within the preservation zone at fair market value. New approaches are needed.

This brief overview describes a system of tradable conservation credits that can be used to facilitate multiple species and multiple landowner HCPs. The authors have dubbed this approach "The Habitat Transaction Method."

SUMMARY OF THE HABITAT TRANSACTION METHOD

The Habitat Transaction Method relies on the efficacy of the marketplace, rather than a command and control planning system, to accomplish the conservation and enhancement of endangered species habitat. Under the Habitat Transaction Method, conservation objectives are not expressed in terms of the preservation of specific parcels of land, but rather in terms of overall habitat preservation, which in aggregate, constitutes "conservation value" sufficient to sustain species and/or populations addressed by an HCP.

A process is established for measuring the initial conservation value of all the land in the planning area covered by the HCP, expressed in terms of standardized "conservation units." Any landowner who agrees to conserve or restore habitat within the planning area receives credits based on the conservation value that the landowner adds to the reserve system. Any landowner proposing a project that would cause a loss of conservation value is required first to offer a number of credits based on the decrease in conservation value that would result from the development. Landowners who receive credits for conservation actions may either use the credits to develop elsewhere within the planning area or sell the credits to any other landowner who needs credits to compensate for project impacts.

Demand for development thus creates a corresponding demand for conservation; resulting conservation activities should generate a reserve system that meets pre-established conservation objectives. In addition, an adaptive management scheme, based on research and monitoring programs, is put in place to provide for appropriate habitat management, necessary mid-course corrections to the plan, and a safety-net against unforeseen circumstances.

BIOLOGICAL CONSIDERATIONS

The central biological premise of the Habitat Transaction Method is that objective measures of conservation value can be defined in terms of conservation units —

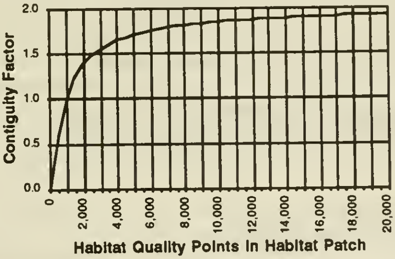
indicators of long-term habitat value for specified target species. Conservation units are used to quantify the conservation actions that must occur to assure the persistence of those species, and to determine acceptable incremental trade-offs between habitat conservation and habitat loss. The development of a definition of conservation units occurs in two basic steps — the definition of habitat quality and the adjustment of habitat quality determinations based upon landscape-level factors — to arrive at conservation value.

For individual species planning, habitat quality reflects the extent to which the physical, biological, and other environmental characteristics of an area correspond to the habitat characteristics of the target species. For multiple species planning, habitat qualities for target species are considered in concert; the definition of quality then reflects overall multiple species planning goals. For whole ecosystem planning (that is, planning for ecological communities), quality is measured in either of two ways (preferably by both): by physical properties that reflect ecosystem diversity, function, or health, such as topographic diversity, watershed integrity, or proximity to other protected lands; or by biological properties, such as the distribution and abundance of select indicator species, vegetational community composition, or proportion of invasive alien species.

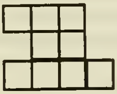
Sound conservation planning must, however, look beyond habitat quality assessments to the roles of myriad factors that determine conservation value (i.e., the ability of an area to support species of concern over the long term). Such factors include habitat size and configuration, landscape linkages or corridors, edge effects, species interactions; and consideration of such phenomena as threats from invasive species, the roles of unoccupied habitats, special landscape features, and habitat refugia in population persistence. All of these factors are considered in defining conservation units, determining the currency used to facilitate market exchange, and selecting a "conservation ratio" — the number of conservation units that must be conserved for each unit lost, toward the realization of long-term conservation objectives.

A relatively simple, yet robust, definition of conservation value for a particular habitat type is developed using a scheme similar to the following: First, habitat quality points are assigned to habitat areas with a range of values between 0.0 and 1.0 points per acre, based upon the extent to which the land is characteristic of the subject habitat type. Points are assigned based on such factors as soil types, slope and aspect, elevation, quality of characteristic vegetation, presence or absence of indicator species, etc. The point system can then be used to make a rough habitat quality map of the planning area.

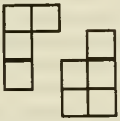
Second, habitat quality points are adjusted based upon the size and contiguity of patches of habitat in the planning area. The contiguity adjustment is based on how extensively the patches of habitat are connected in contiguous areas. To make the adjustment for contiguity, the habitat quality value of each parcel is multiplied by a factor based on the size of the contiguous patch of habitat of which it is a part. Those factors are determined using a curve such as the following:



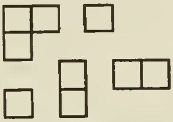
The effect of applying the contiguity factor is to devalue fragmented habitat and assign higher value to connected habitat. This effect is illustrated by applying the factor to the following three configurations in which each square has 200 habitat quality points:



1,800 Pts Pre-Adjusted.
2,376 Pts Contiguity-Adjusted



1,800 Pts Pre-Adjusted
1,696 Pts Contiguity-Adjusted

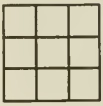


1,800 Pre-Adjusted
888 Pts Contiguity-Adjusted

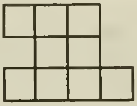
Finally, habitat values are further adjusted based upon the overall configuration or shape of the habitat patches. The more round the configuration, the closer the shape factor will be to 1; the more linear or irregular the configuration, the closer the shape factor will be to 0. The formula,

$$\text{Shape Factor} = 2\pi\left(\frac{\sqrt{A/\pi}}{P}\right)$$

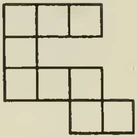
is used to determine this factor, based on the combined land area (A) and combined perimeter (P) of all of the habitat patches in a given configuration. The effect of the shape formula is illustrated below by applying it to each of the following three configurations that have the same contiguity-adjusted value, but varying shape factors:



2,376 Pts Contiguity-Adjusted.
2,115 Pts Shape-Adjusted



2,376 Pts Contiguity-Adjusted.
1,568 Pts Shape-Adjusted



2,376 Pts Contiguity-Adjusted.
1,259 Pts Shape-Adjusted

These final shape-adjusted values represent the conservation value of each of these configurations in terms of conservation units.

The definition of conservation value in the above illustration takes into account inherent habitat quality, patch sizes, connectivity and fragmentation of habitat, length and width of habitat corridors, exposure of habitat to unprotected edges, and the general roundness of the habitat configuration. This basic approach can be readily adjusted to take into account other important conservation value considerations as well.

Since the Habitat Transaction Method provides that landowners will receive credits, or will be required to pay credits based upon the definition of conservation value, they will have a strong incentive to cooperate with adjacent landowners to protect land in configurations with long-term conservation value and, conversely, to avoid actions that would significantly diminish long-term conservation value. Reducing the definition of conservation value to a relatively objective formula facilitates efficient transactions and allows landowners to calculate readily the costs and benefits of various development and conservation scenarios.

Using the techniques for measuring conservation value described briefly above, the Habitat Transaction Method assures that habitat areas comprising a predetermined conservation value—taking into account both habitat quality and reserve design requirements—will be protected, based upon the definition of conservation units. The method then uses market forces to determine an economically efficient means of protecting that conservation value. An adaptive management scheme, including reserve management, research, and monitoring components, is established to respond to inevitable shortfalls in available scientific data that result in uncertainties associated with the definition of conservation values and other elements of plan design.

ECONOMIC CONSIDERATIONS

The cost of habitat acquisition under an HCP that employs the Habitat Transaction Method is inherently covered by the credit-trading mechanism itself—new development pays the price by purchasing credits to compensate for its impacts on habitat. In addition to such costs, however, the up-front costs of planning and biological studies, the continuing costs of administration, and the continuing costs of reserve management must also be covered. Since endangered or threatened species crises that spawn HCPs are due to accumulated impacts of existing development (which typically has made no contribution toward habitat conservation), costs should be allocated as broadly as possible to all who benefit from the realization of conservation goals.

While the efficiency of the Habitat Transaction Method should significantly reduce costs of mitigating endangered species impacts and should distribute costs more equitably among landowners, mitigation costs for landowners in at least some geographical areas would remain daunting. Although it is beyond the scope of this presentation to resolve this issue entirely, suffice it to suggest that all means should be employed to reduce the burdens presently borne by owners of undeveloped land, and to spread the cost of endangered species protection broadly and fairly.

Various methods can be used in conjunction with the Habitat Transaction Method to reduce costs to landowners, such as capital gains tax breaks on the sale of credits, density bonuses for landowners who must offer credits, open space credit for landowners who must offer credits, public acquisition of land for the reserve system, and the contribution of appropriate public lands to the reserve system. Other costs associated with HCP implementation (besides land acquisition) also should be spread using such means as state and federal grants, state and local bond measures, surcharges on broad-based commodities such as water and energy, and special real estate taxes on users of land.

ADVANTAGES OF THE HABITAT TRANSACTION METHOD

The Habitat Transaction Method provides numerous advantages from both a conservation standpoint and a private property standpoint, particularly when numerous private landowners are included in an HCP. Some advantages from the standpoint of conservation are as follows:

> **The Habitat Transaction Method is based on sound biology.** A planning process using the Habitat Transaction Method explicitly acknowledges the biological requirements of the species and habitats to be protected and expresses them as quantifiable objectives. The plan then assures that the reserve system created through "habitat transactions" will meet those objectives.

The Habitat Transaction Method assures that a cohesive reserve system results. By defining conservation units to take into account such considerations as reserve shape and connectivity, a cohesive reserve system is assured. Parcels of land that can contribute in a meaningful way to the reserve system are given higher credit value. Conversely, disincentives are included for actions that could fragment or otherwise isolate important habitat areas.

Landowners have incentives to enhance reserves. Landowners are rewarded for enhancing the reserve system by voluntarily conserving parcels of high conservation value. The greatest incentives are offered to those with habitat that exists in larger, contiguous blocks, or as linkages between patches of conserved habitat. Such incentives unleash the market forces associated with landowners competing to add conservation value to the reserve system.

Parcel-by-parcel land use disputes are avoided. Parcel-by-parcel disputes over the adequacy of project mitigation measures are avoided, making the plan efficient for both the public and the private sectors.

Monitoring program provides a safety net. An obligatory, scientifically sound monitoring program provides a safety net for the plan by requiring that the plan be modified over time if necessary to meet stated conservation objectives.

Some advantages of the Habitat Transaction Method from the standpoint of private landowners are as follows:

No boundary lines are drawn. No arbitrary boundaries are used to divide landowners into one class that benefits from the plan and another class that does not.

Efficient means of mitigation are provided. Landowners desiring to pursue projects that result in take of habitat have an efficient means of doing so—by either setting aside land of sufficient conservation value, or by purchasing credits from others who have set aside habitat of sufficient conservation value.

Valuable habitat translates to economic value. Landowners with valuable habitat on their land can realize the fair-market value of that land as habitat; the higher the habitat value of land, the more credits a landowner will receive for conserving it.

Landowners control their own destiny. Landowners are not forced to conserve land, nor are they prohibited from developing land. They can make their own economic choices to maximize their profits in the context of the conservation credit system.

Costs to landowners can be offset. As noted above, the credit system is easily integrated with a variety of techniques to offset costs of conservation to landowners.

COMPARISON WITH OTHER MARKET-ORIENTED INNOVATIONS

Other market-oriented techniques have been employed with varying degrees of success to resolve environmental land use issues. The two techniques most widely used are mitigation banking and transferable development rights; however, for purposes of endangered species protection, these methods are less flexible than the Habitat Transaction Method.

Mitigation banking has been used most often in the wetlands context. It typically involves a landowner setting aside of an area for preservation and/or enhancement and receiving credits that can be sold to others who need mitigation credit elsewhere. Mitigation banking works only when a landowner with sufficient holdings and means goes through the legal and administrative costs of setting up a bank. Such banks typically use credits that require further consent of resource agencies, thereby reducing the certainty that the credits can be sold for value. By contrast, under the Habitat Transaction Method, any owner of land with significant conservation value, even if the parcel is quite small, may set the land aside through a simple administrative process and receive credits that are assured of being valuable to other landowners for mitigation. The Habitat Transaction Method coordinates land set asides by many landowners, rather than merely facilitating the set aside of particular parcels.

Under the transfer of development rights ("TDR") approach, a landowner in a designated "sending area" receives TDRs for preserving his or her land and may sell them to an owner of land in a designated "receiving area," to be used to increase allowable development densities. TDRs have proven to be useful, particularly on small geographic scales where sending and receiving areas are clearly defined and are relatively non-controversial. The Habitat Transaction Method provides more flexibility since it does not require the identification of sending and receiving areas, nor the commitment of local communities to development density increases in certain areas.

LEGISLATIVE ASSISTANCE NEEDED

The Habitat Transaction Method does not require a major legislative initiative for it to be used legally. Rather, it should be encouraged through an expression of

Congressional intent to view favorably the use of market-oriented methods to implement HCPs under Section 10(a) of the ESA. This intent may be signaled either directly in language accompanying reauthorization of the ESA or through legislation soliciting pilot programs using market-oriented implementation techniques.

Two important reforms of Section 10(a) of the Act will also facilitate the Habitat Transaction Method and other multi-species planning tools. First, Section 10(a) should authorize the Secretary to issue permits for the take of species that are not listed as long as those species are adequately addressed in an HCP. Such prelisting permits would be effective after the listing of such species, absent unforeseen circumstances. Second, Section 10(a) should provide for fixed time periods within which the Secretary must respond to applications for Section 10(a) permits, and should require the Secretary to propose reasonable and prudent alternatives if the application is denied.

Finally, one tax clarification would be helpful for implementation of the Habitat Transaction Method, and two tax incentive provisions would be very helpful for large-scale HCPs in general. These provisions are summarized as follows:

> **Clarify that receipt of credits is not a taxable event.** The receipt of tradable credits for granting land or restricting land use for conservation purposes should not be treated as a taxable event until such time that the credits are sold or traded for value. This provision would assist conservation plans that use tradable credits by eliminating two negative tax effects: the current taxation of credits prior to their conversion into cash or other asset values, and the taxation of credits used by a landowner internally when direct negotiation of a habitat set-aside outside of the credit system would not have been taxable at all.
>
> **Provide a capital gains exclusion for land transfers that facilitate conservation.** A significant percentage, say 60 percent, of any long-term capital gain resulting from granting land or restricting land use for conservationshould be excluded from income. To qualify as a “long-term” capital gain, the person realizing the gain must have held the land for 12 months or more. This provision would give landowners who have held land for long periods of time, and who would realize a large gain upon selling their land, a strong incentive to provide the land for conservation in exchange for cash or credits. The supply of land available for conservation should, therefore, be increased and the cost of acquiring land for conservation decreased.
>
> **Provide for deferred recognition of gain from land transfers that facilitate conservation.** A landowner who receives compensation for selling land or restricting land use for conservation purposes should be allowed to reinvest the proceeds of the sale in a new real estate investment, and defer recognition of a taxable gain until the sale of the new investment

under the "involuntary conversion" provisions of Section 1033 of the Internal Revenue Code. This provision would provide additional incentives to private landowners to conserve land rather than develop it, thereby increasing the supply of land available for conservation.

CONCLUSION

The Habitat Transaction Method provides a biologically sound and economically efficient approach to habitat conservation planning that can be particularly useful to complex planning exercises that involve many species and many landowners. This approach would be greatly facilitated by Congressional recognition of such market-oriented approaches, by legislation that authorizes pre-listing take permits and requires timely and instructive responses to applications for take permits under Section 10(a) of the ESA, and by legislation that gives landowners tax incentives to provide their land for conservation purposes in exchange for either cash or credits.

PlumCreek Timber Company, L.P.

STATEMENT OF JAMES A. KRAFT

VICE PRESIDENT, LAW AND CORPORATE AFFAIRS
PLUM CREEK TIMBER COMPANY, L.P.

on Incentives for private landowners under the Endangered Species Act

Before the Subcommittee on Environment and Natural Resources
of the
House Committee on Merchant Marine and Fisheries

October 13, 1993

Plum Creek Timber Company, L.P. is an integrated forest products company with timberlands and mills located throughout the Pacific Northwest

999 Third Avenue Suite 2300 Seattle, Washington 98104-4096 206/467-3600

My name is James Kraft. As Vice President for Law and Corporate Affairs for Plum Creek Timber Company, I have been intimately involved with the Endangered Species Act and how it affects private landowners for the past four years. Plum Creek's 1.2 million acres of timberlands, which are located in Washington, Idaho and Montana, are home to numerous listed and candidate species including the northern spotted owl, the grizzly bear and the bull trout, to name a few. In fact, Plum Creek has the most grizzly bear habitat of any private company and has nearly half of the 44 spotted owl nest sites that occur on private lands in the state of Washington.

I want to thank the Subcommittee for the opportunity to testify today on how economic incentives can be used to encourage landowners to conserve endangered and threatened species and their habitat on private property and contribute to the recovery of these species. This subject is especially timely because the Endangered Species Act is not working well today for either listed species or private landowners.

One reason the ESA is not working well is that §9 of the Act serves as a powerful economic and regulatory disincentive to beneficial management for listed species. Since time is limited, I would like to describe from my Company's experience, one example of how the ESA inhibits management that is both consistent with the economic role of private land and aids the conservation of listed species.

In 1990, prior to the listing of the northern spotted owl, Plum Creek biologists and foresters devised an innovative harvest prescription around a spotted owl nest using new forestry techniques. In the 36 acres immediately adjacent to the nest site, the Company left 80% of the trees but was able to remove 50% of the value, with the intent that this area would continue to be suitable habitat for the owl soon after harvest. In an area further removed from the nest site,18-22 trees per acre were left. Here the harvest was designed to leave a residual stand that would regrow into suitable habitat in 40-50 years -- half the time it would ordinarily take to become suitable habitat if conventional techniques had been used. While there was a cost associated with leaving merchantable trees for wildlife conservation, in this case we had the operational flexibility and the necessary cash flow from our other lands that enabled this type of prescription.

Today, we could not replicate this harvest because of the ESA and state regulations based on federal guidelines, nor is there any incentive for us to do so. Yet it is exactly this type of adaptive management that is encouraged by the federal policy embodied in "Option 9" selected by President Clinton.

If we wish to have a law that truly encourages the conservation of listed species that also respects the economic role of private lands, then the Endangered Species Act needs to be changed. Specifically, the Act should be amended to provide mechanisms for the conservation of listed species in lieu of current regulations that mandate the setaside of private land without compensation. Today, I would like to discuss two mechanisms as well as examples of where and how they might be used.

First, the Act needs an explicit provision that facilitates the timely exchange of environmentally sensitive private land. Although §5 of the ESA authorizes the Secretary of Interior or Agriculture to acquire land either through "purchase, donation or otherwise," historically, that provision has been underfunded and underused.

Exchanges are difficult if not impossible to do, particularly in areas inhabited by listed species. For example, in the late 1980s Plum Creek was involved in two potential exchanges covering nearly 40,000 acres of land in an area just east of the Cascade crest near the I-90 corridor in the State of Washington. It was generally recognized that these lands were environmentally sensitive. Today we know that these lands are home to numerous spotted owls. Neither exchange, however, came to fruition due to Forest Service opposition. Exchanges that would otherwise have rationalized the land ownership pattern in this area and facilitated conservation of the spotted owl were cancelled due to the uncertainty created by the ESA and by opposition within the Forest Service to the loss of its suitable timber base.

Even where exchanges have been accomplished, they have taken an inordinate amount of time to complete. Plum Creek's experience has been that on average, exchanges take 7 years. The recent Potlatch interstate exchange involving lands in Idaho and Arkansas was commenced five years ago and questions about an ongoing appropriation continue. The Gallatin Land exchange that was just signed into law took over a decade to complete.

If it is determined that the primary role of the Forest Service is to protect environmental values on a landscape basis in the context of multiple use, then land exchanges need to be reemphasized. Exchanges should be focused on private lands that are essential to the conservation of listed or candidate species. For example, Plum Creek owns substantial acreage intermingled with that of the Forest Service inside the proposed late successional reserve areas identified under Option 9 as preserves for spotted owls. In these predominantly old growth areas little or no management is to occur on federal lands. Since such a management regime would be inappropriate for the intermingled private lands, it would be preferable both for the listed species and the private landowner for these lands to be exchanged for federal land elsewhere that was more suitable for commercial forestry.

In order to expedite such exchanges, Section 5 of the act should be amended to provide that private lands in such recovery areas be acquired, preferably through the exchange of other federal land with equal market value. Section 10 of the ESA should also be amended to provide that expedited land exchanges be available as part of the habitat conservation planning process. Currently, the HCP process administered by the Secretary of the Interior and the land exchange process administered by the Secretary of Agriculture for the US Forest Service are separate, making a solution which combines both more difficult to accomplish. Land exchanges that are consistent with the conservation objectives of §10 could be folded into the HCP process. NEPA compliance required for an HCP could cover such complementary land exchanges. Such streamlining would give private landowners an incentive to undertake the HCP process.

In addition to a mechanism that facilitates land exchanges, the ESA should be amended to provide an incentive mechanism to encourage the provision of benefits for listed or candidate species on private lands. While incentives can take many forms, any incentive should encourage practices that make operational and economic as well as environmental sense. Market-based incentives are more efficient than regulatory mandated restrictions. Moreover, if the incentive is to be effective, it must offset the net cost of the desired practice so as to provide an acceptable rate of return to investors and owners. Without such a return, necessary investment in sound forestry would be discouraged rather than encouraged. Finally, the funding of incentives should reflect both the broad public benefit of an improved environment as well as the long term nature of the benefit.

At least two types of incentives would meet these criteria: tax benefits for designated conservation activities and negotiated management contracts pursuant to which the private landowner would be compensated for conservation activities.

Tax incentives would be most efficient if structured in such a way as to provide the greatest economic benefit for activities that were most environmentally desirable. The Secretary of the Interior, for example, could be directed by the ESA to promulgate a rule that identified certain forestry practices or activities that conserved either listed or candidate species. Such activities might include New Forestry prescriptions, expanded stream buffers, dispersal prescriptions, wildlife corridors, stream enhancement projects, prescriptions that provided stand structures that were in short supply, or other activities as appropriate. Listed activities, if carried out by a private landowner, would entitle the landowner to certain tax deductions or credits. Alternately, such tax benefits could be made available to landowners who voluntarily adopt such activities as a part of a habitat conservation plan.

The amount of such tax benefits should be based on three factors: (i) the fair market value or cost to the landowner of the conservation activity; (ii) whether the activity occurred in an environmental priority area; and (iii) the degree to which the conservation activity was permanent. Fair market values could be determined in the same manner that values are currently determined in arriving at charitable gift deductions. Under this mechanism, a matrix of tax incentives could be promulgated by rule with the priority of the area in question on one axis and the type of activity on the other axis. Thus, permanent conservation easements in high priority areas would be entitled to the highest levels of tax incentives. For example, the grant of a conservation easement covering activities on lands adjacent to fish bearing streams would be entitled to the highest levels of tax benefit.

In order to ensure that such incentives were cost effective, the Treasury Department, in consultation with the Department of the Interior, should be directed to establish incentive levels designed to induce desired levels of private conservation efforts within budgeted levels of tax cost. Further, the Treasury Department should periodically revise the incentive levels to ensure that the incentives were inducing desired levels of conservation on private lands.

A second incentive mechanism that could be added to the ESA would be "negotiated management contracts." Such contracts would delineate both the private lands covered, as well as agreed to conservation activities. Once accepted by the Secretary, the landowner would be bound by the specific terms of the contract rather than the general requirements of §9.

First, the Secretary of the Interior would be directed to assess and prioritize which activities on private lands were desirable for the conservation of listed and candidate species. The Secretary would then put out to bid or otherwise seek out landowners who were willing to enter into such contracts. In so doing, a market would be created where demand would be governed by the amount of funding provided for such contracts and supply would be governed by the cost of the conservation measure in question. If the contract price were too low, there would be no interested landowner. Through the bidding process, however, the Secretary should be able to establish a low-cost market price, thus allocating scarce federal resources efficiently to the highest priority conservation efforts.

A key question with this, and every other incentive, is how they are to be funded. Since conservation efforts benefit the public, not only today but for many generations to come, funding should be broad-based and spread out over time. For example, the Secretary of the Interior could be authorized to issue tax exempt environmental bonds with 50 to 100 year maturities. The proceeds from the issuance of such bonds could be used to fund the tax incentives or management contracts mentioned today. Repayment of principal would be from general revenues but amortized over the life of the bonds thus spreading the cost of current environmental conservation efforts to the generations who will reap the benefit of a healthier environment. Interest payments would come out of general revenues or other dedicated funds generated from sources such as increased national park fees.

In summary, the ESA currently is not working well for either species or private landowners. If listed or candidate species are present on one's land, §9 imposes tremendous disincentives to private conservation activities. The current law thus discourages private landowners from taking actions that would further the purposes of the ESA. At the same time that the cost imposed on landowners to protect individual members of listed species is potentially great, the benefits to the conservation of entire populations across the landscape may be small. The regulatory approach mandated by §9 is thus terribly inefficient.

One part of a solution lies in reviving land exchanges that reduce the fragmentation of land ownership patterns. Such rationalization would allow federal and private land managers to better provide the environmental and economic commodities expected from them. Another part of the solution lies in the use of economic incentives that align the self-interest of landowners with -- not against -- the environment. Not only would incentives provide the cash flow essential to fund conservation efforts on private lands, but, when allocated through a market mechanism, would provide the most environmental benefit at the least cost to the public.

Statement
# of Ned Meister
Texas Farm Bureau
before the House of Representatives
Merchant Marine and Fisheries
Subcommittee on Environment and Natural Resources

October 13, 1993

Mr. Chairman and Members of the Committee, my name is Ned Meister. I am the director of Regulatory Affairs for Texas Farm Bureau in Waco, Texas. Texas Farm Bureau is a general farm and ranch organization with producer members in all Texas counties.

I appear before you today to offer a possible solution to the problem of the presence of endangered and threatened species on privately owned farm and ranch land. It is critical that we create a program of inducements to protect species rather than use a heavy handed mandated regulation.

You and the committee members should be congratulated on your efforts to find ways to provide incentives to individual landowners to preserve Endangered Species. In my opinion, the current act provides almost no incentives, with only penalties for the interruption of any Endangered Species. History indicates that incentives will do far more to achieve our stated goal of the preservation and propagation of endangered plants and animals.

Mr. Chairman, what I propose to your Committee today is a program which is similar to the Conservation Reserve Program (CRP) operated by the U.S. Department of Agriculture since 1985. The purpose of that program is to protect and preserve highly erodible land. I might add that the CRP has proven highly successful by enrolling farmers in this voluntary program. The Wetlands Reserve Program is another example of a voluntary program that illustrates farmers' willingness to participate in conservation efforts.

The Critical Habitat Reserve Program would consist of a 5 year contract between the Department of Interior and individual landowners. As proposed, the contract is subject to renewal as long as the species is threatened or endangered. We would propose that the program be voluntary, with producers submitting bids for the approval of their contracts just as is currently practiced under the CRP. Where a threatened or endangered species could not survive without some type of action, our plan provides for a resolution process that we believe offers private landowners a better alternative than existing law.

Under the proposed contract, landowners would be required to implement an approved recovery plan and restricted from any unspecified use of the property. Periodic inspections by appropriate officials would insure compliance with the plan. Violation of plan agreements could result not only in forfeiture of benefits but assessment of penalties as well.

Our recommendation would be that these contracts call for the lease of the property by the Federal Government rather than an easement. The more responsibility the individual landowner has, the better he or she can be expected to perform. Obviously, in addition to inspection visits, an oversight responsibility would be necessary.

The USDA has a history of providing incentives to producers and hopefully any new program could be coordinated with that agency to best assure success. However, I would assume that final authority for determinations would be with the Interior Department.

Mr. Chairman, the American Agriculturist has made this nation the "breadbasket" of the world, providing its citizens with the most abundant, safest, most inexpensive food supply in the world. With all due respect, if this committee wishes to preserve a species, be it plant or animal; the American farmer and rancher, with proper incentives, can do it.

In the interest of time, I will submit a copy of the overall Critical Habitat Reserve Program for the record, and thank you for allowing me to present this testimony today. I will answer any questions you might have at this time.

ENDANGERED SPECIES
PRIVATE LAND CONSERVATION AND PROTECTION PROGRAM

I. PURPOSE

A. To develop a voluntary cooperative effort between the U. S. Fish and Wildlife Service and cooperating private land owners for the establishment of Critical Habitat Reserves (CHR) to protect Threatened and Endangered Species.

B. Protect Constitutional property ownership rights of private land owners.

II. CRITICAL HABITAT RESERVE (CHR)

A. General Provisions

1. The Secretary of Interior (Secretary) will contract with cooperating land owners/operators to provide Critical Habitat (CH) and land owner/operator management of the CH for the protection of Threatened and Endangered Species.

2. No more than 25% of the land mass or water bodies in any one county will placed in a CH reserve unless additional areas would not have an adverse effect on the local economy.

3. Contracts will be for 5 years and renewable only if the presence of a Threatened or Endangered Species exists.

B. Duties of the Secretary

I. In return for a contract, the Secretary shall:

a. Provide for the cost of carrying out the CHR Program.

b. Pay annual rental and management fee during the term of the contract to the land owner/operator for the conversion of private property uses to the CHR.

c. Provide technical assistance and management training to cooperating land owners/operators through the U. S. Fish and Wildlife Service.

d. Consult with the Secretary of Agriculture to insure that the program is harmonious with programs of the U.S.D.A.

C. Payments

1. The Secretary shall provide payment for obligations incurred:

   a. With respect to the cost of CH preparation.

   b. With respect to management fees.

   c. With respect to annual rental:

      i. Upon the signing of a contract with a land owner/operator and on each anniversary date of the contract.

   d. The amount of rent shall be determined by a rental bid from the land owner/operator.

   e. Payments shall be made in cash.

   f. Endangered Species CHR Program shall not be subject to payment limitations.

   g. Payments shall be independent of any other payments on the same land or waterbody.

2. The Secretary shall provide payment for lost revenue to local governmental entities as a result of CR designation:

   a. With respect to revenue paid "in lieu of taxes" to local governmental entities from the sale of timber from National Forest lands.

   b. With respect to revenue paid to local governmental entities derived from the lease or rental of grazing rights on Bureau of Land Management lands.

D. Contracts

1. A contract shall continue in force for the 5 year duration.

   a. If land ownership/operator changes occur during any contract period, the new land owner/operator may enter into a new 5 year contract period on the anniversary date of the contract in force at the time of the acquisition if the presence of a Threatened or Endangered Species exists.

2. Contracts shall not prohibit any agricultural use of land or of a water body placed in the CHRP unless that use is proven by sound scientific basis to jeopardize the existence of an endangered or threatened species.

3. The Secretary may modify a contract only if the owner/operator agrees.
4. The Secretary may terminate a contract only if the owner/operator agrees.
5. Public access shall be allowed only if the land owner/operator agrees and the agreement is openly stated in the contract.
6. Contracts shall be in lieu of statutory recovery plans for the same species on the same land or water body.

E. Duties of Land Owners/Operators

1. The land owner/operator must agree:
    - a. To implement an approved CHR plan.
    - b. Not to use CHR land for purposes other than those provided for in the contract.
    - c. To periodic inspections to determine compliance with the contract.
    - d. On violation of a term or condition of the contract:
        - i. Forfeit all rights to rental and management fees and refund payments with interest to the Secretary; or
        - ii. To refund or accept adjustments to rental and management fees; and
        - iii. The Secretary will determine if the violation should or should not warrant termination of the contract.

F. Special Provision

1. Crucial Critical Habitat (CCH) - A site specific habitat without which a threatened or endangered species could not survive.
    - a. If a land owner/operator and the USFWS are unable to agree on program participation in areas that are determined to be CCH, an arbitration panel knowledgeable of the value of the CCH in relation to the survival of the species, shall resolve the differences between the land owner/operator and the USFWS.

III. Overall Administration of the Program

A. Responsibilities of Congress

1. Appropriate funds to adequately carry out the program.

B. Responsibilities of Federal Agencies

1. U. S. Fish and Wildlife Service (USFWS)

    a. Develop accurate scientific data for the determination of threatened and endangered species and critical habitat.

    b. Develop critical habitat boundaries based on current actual range of the affected species.

    c. Provide technical assistance and management training to cooperating land owners/operators.

    d. Conduct public hearings concerning proposed CHR designations and provide public notice through the Federal Register and local newspapers.

    e. Notify each affected land owner/operator of the proposed CHR designation by registered mail.

    f. Make inspections and evaluations of the progress of each privately managed critical habitat.

2. U. S. Department of Agriculture

    a. Assist USFWS with boundary delineation of agricultural land.

    b. Provide CHR planning to maintain soil and water integrity.

    c. Review proposed CHR to prevent conflicts with current U.S.D.A programs.

    d. Review contracts to insure acceptable agricultural land and water management practices are followed.

3. U. S. Department of Labor

    a. Provide a retraining program for persons displaced from jobs as a result of CHRP designations.

C. Responsibilities of State Agencies

1. State Fish and Game Agency

a. Assist USFWS with technical assistance and training for cooperating land owners/operators.

2. Land Grant Universities

a. Develop training and educational materials for the CHR managers.

3. State Soil and Water Agencies

a. Assist U.S.D.A. with CHR planning to insure soil and water quality.

D. Responsibilities of Local Governments

1. County property appraisal agency.

a. Develop an equitable method of appraisal for land entered into the CHRP.

IV. Administration

A. Final CHR determinations shall be made jointly by the Departments of Interior and Agriculture.

B. The Secretary of Interior shall develop an appeal procedure for persons adversely affected.

1. Persons affected would be those who could:

a. Show infringement on their private property rights.

b. Show substantial economic harm as a result of a CHR designation.

C. The violation of a contract by one operator shall not effect the contracts of other operators of land of a common land owner.

D. The interests of, in any single contract, shall be protected with respect to the sharing, on a fair and equitable basis, of the rental payments contracted for in the CHRP.

STATEMENT OF THE WASHINGTON FOREST PROTECTION ASSOCIATION TO THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES COMMITTEE OF THE MERCHANT MARINE AND FISHERIES UNITED STATES HOUSE OF REPRESENTATIVES

By William C. Jacobs
Executive Director, Washington Forest Protection Association

November 8, 1993

Mr. Chairman and members of the Committee. Thank you for the opportunity to testify before you regarding the Endangered Species Act (ESA). We will comment on the need to develop a variety of incentives for private landowners to take additional actions to protect and conserve species listed under the act.

The Washington Forest Protection Association is a trade association representing the industrial forest landowners in the state of Washington. We were founded in 1908. In the aggregate our members own approximately 5,000,000 acres (28%) of Washington's commercial forest land. Another 4.8 million acres (27%) is owned by private non-industrial landowners. This 55% of the commercial forest land base provides 75% of the wood fiber produced in Washington for national and international markets.

Our business is the growing, management and harvesting of timber applying the latest science and technology. We manage our lands on a sustained basis. We are a highly regulated industry, subject to a very stringent state forest practices act and its rules and regulations. We are required by law to replant, to protect forest soils, fish, wildlife, water quality and quantity, and air quality. We also voluntarily set aside lands for wildlife and fisheries protection, and undertake wildlife and fisheries habitat enhancement projects each year.

Our industry is the second largest employer in Washington, and the largest employer in the Pacific Northwest. In Washington, it has a payroll of $1.9 billion, and 1 out of 11 jobs is related to our industry. As one regional economist pointed out, "...the loss of jobs in the forest products industry will not stop our economy in its tracks but it will have a measurable effect on its growth rate."

I want to assure you that the forest products industry is strong and productive. It can remain that way, if there is a reasonable resolution of such critical public policy issues as the impact of the ESA on private forest landowners.

I would like to cite for you a few facts from a recent timber supply study funded by the Washington State Legislature and conducted by the University of Washington College of Forest Resources concerning our industry in Washington:

[2]

- The study points to increasing productivity and increasing supply of trees available on private forestlands for the next 90 years, given predicted market conditions.

- The study indicates how crucial it will be for public policy to support the role of private forestlands as sources of forest products and to avoid undue restrictions which might undercut this role. For example, if private landowners are required to set aside more land for other uses, such as protection of endangered species, the drop in forest harvests could be greater than the land set aside. A 15 percent reduction in the accessible land base would reduce future harvests by 21 percent on industrial forestlands.

- Between the 1980 and 1990 survey periods, the area of private timberland harvest averaged 1.5 percent per year, a level that points to successful, sustainable management.

- Washington state forests aged 100 years or more are expected to increase 20 percent by 2090. Wildlife species which thrive in old growth trees are expected to benefit under this projection.

- New restrictions will reduce future harvest levels: Industrial private landowners have historically been the largest source of westside harvest. The TSS projects that this important ownership group can maintain the average harvest levels of the 1980s through the 21st century (2085). The Study further projects that nonindustrial private lands have the potential to maintain the average harvest levels of the 1980s over the next century.

- The Supply Study also provides an estimate of the impact to private landowners of setting aside more land for other uses including the protection of public resources. According to the TSS, a 15 percent reduction in the accessible land base would reduce harvests by 24 percent on industrial lands and by 12 percent on nonindustrial timberlands in the near term.

- Future restrictions will dramatically reduce harvest potential: Increasing rotation ages or setting aside more accessible commercial timberlands for other uses could dramatically reduce the availability of private timber in the next 15 years. The TSS estimates that if private timberland owners are required to increase their planned rotation ages by 10 years, the average harvest will be reduced by 25 percent on industry lands and by 12 percent on nonindustrial lands.

- The habitat for wildlife will change: The study projects the shift of the type and quantity of wildlife habitat that might occur over the next 100 year period for the entire forest land base in western Washington. According to the study, areas of large sawtimber and old growth (100 years plus) are expected to increase steadily over the period. Conversely, areas in stands in grass forb (0–25 years), open sapling–pole and

> closed sapling–pole sawtimber classes (50–100 years) are expected to decline. Thus, wildlife species with a habitat preference for older age classes of timber will benefit by the projected changes in age classes.

The September issue of Forbes Magazine contained an article about investment in timberland. The point of the article was that such investments were probably a good gamble. The article predicts that increased demand that will far outstrip supply. However the article did cite one real downside to investing in timber land: the impact of environmental regulation. That warning should not be taken lightly. The ESA is the law of choice for challenging economic activities involving land and natural resources. One environmental activist called it the "pit bull of environmental laws". We prefer the description given by a staff member of a committee in the U.S. House of Representatives. He described the ESA as "cold blooded, cut and dried."

As with any investment, intensive forest management is dependent on the ability to ultimately realize an acceptable rate of return. However, the time frame for forestry investments is extraordinarily long: fifty or more years into the future in our region. Similarly, investment in new processing facilities and modernization of existing facilities is dependent on markets and a steady supply of timber at competitive prices.

As these two reports indicate, the major issue facing the forest products industry is not whether we will have timber to harvest, but rather will we be able to harvest the timber we grow. The answer to that question will dictate future investment and reinvestment in forest land and manufacturing facilities in our state and the Pacific Northwest. The ESA can accomplish its legislative objectives without discouraging continued investment in forest land, forest management and wildlife protection.

In my comments today, I want to describe for you how the listing of the Northern Spotted Owl under the ESA has created enormous economic disincentives to invest in forestland and forest management for both the production of fiber and wildlife protection. I will address four points (1) The conduct of the U.S. Fish and Wildlife Service (FWS) in defining what constitutes "take " in Section 9 of the ESA (i.e., the infamous owl guidelines) and the effect it has had on the willingness of landowners to consider entering into cooperative wildlife projects and processes with the FWS, particularly habitat conservation plans; (2) The economic impact of these guidelines on private forest landowners; (3) The significance of the proposed 4 (d) rule being drafted to complement and support the President's Option 9; and (4) The environmental impact resulting from a lost in the production of wood fiber from forest lands in the Pacific Northwest caused by a shift in markets and harvesting to other countries.

I will conclude my remarks with some suggestions for improving the ESA and providing a balanced, fair and workable act that will encourage continued investment in the forest products industry while creating a positive and cooperative atmosphere for enhancing protection of the owl and other listed species.

1. The Conduct of the FWS and the Owl Guidelines

You have received considerable testimony on the need for incentives to encourage landowners to provide even greater protection for wildlife than currently exists. There are many excellent ideas being considered. However, to make incentives work, there must be trust. Agency personnel responsible for working with landowners must demonstrate they are fair, reasonable and genuinely committed to cooperation. They must be able to understand and appreciate the opportunities and the constraints that private land management presents. Without trust, incentive programs and cooperative efforts will not happen.

Unfortunately, the level of trust with some state and regional personnel of the FWS is at an all time low because of the manner in which they have conducted themselves with respect to the listing of the Northern Spotted Owl. At issue is the infamous owl guidelines developed by the FWS for defining what constitutes "take" of an owl.

Under section 9 of the ESA, the definition of "take" includes "harm" to a species. The FWS rules interpret "harm" to mean "significant habitat modification" to the point of injuring a threatened and endangered species. Numerous opinions by the FWS have stated that harm cannot occur in the absence of injury. I assure you that private forest landowners are prudent with their forest practices and go to whatever lengths necessary to avoid any action that might be considered harm and injury to a species.

Shortly after the owl was listed in June of 1990, the State Field Supervisor for the FWS was quoted as saying that private and state landowners won't be required to modify their operations except near nests and activity centers. He said the new guidelines i.e. "owl circles" would put to rest landowner concerns and the predictions of "doomsayers" that private and state forest lands would be significantly impacted by the guidelines. Specifically he said " it hasn't happened and it isn't going to happen".

I don't know what would prompt someone to make such a emphatic statement before the actual impact of the new guidelines defining harm could be evaluated, but I can tell you that the official making that statement could not have been more wrong.

The FWS guidelines he referred to consisted of the following thresholds for determining take of an owl under Section 9 of the ESA:

1. Avoid harvest which results in less that 70 acres of suitable habitat around a nest or activity center; and

2. Avoid harvest that results in less than 500 acres of suitable habitat within a 0.7 mile radius (1000 acres) around a nest or activity center; and

3. Avoid any harvest that results in less than 40% suitable habitat coverage within a circle with a radius from the nest or activity center a distance of 2.2 miles (9,900 acres) for the Olympic Peninsula, and 1.8 miles radius (6,600 acres) for the rest of the state of Washington. For your information I have included a copy of this guidance from the FWS.

The 40% threshold referred to in point three amounts to 4,000 and 2,500 acres per circle on the Olympic Peninsula and the rest of the state respectively. Remember that the official said only activities near a nest would be impacted. I suggest to you that a definition of "near" that operationally restricts 2,500 to 4,000 acres of commercial forest land per owl or pair of owls is unreasonable to the extreme.

The adoption of the guidelines did in fact support the predictions of the so-called "doomsayers" because the FWS has continued to maintain that harvest below that threshold is sufficient modification of habitat so as to constitute harm and thus taking of the species. They have used these guidelines to threaten state public officials with prosecution should they undertake any actions or issue permits inconsistent with the guidelines. As a result, state officials have used the guidelines to control state forest practices. Private landowners were also threatened with prosecution. The result is that for the past three years there has been little harvest within this 40% threshold.

The credibility of the FWS was further damaged when state and regional officials continued to threaten state officials and private landowners with prosecution even though the FWS officially rescinded the guidelines in October of 1991. The rescission was the result of a suit brought in Federal District Court challenging the validity of the process the FWS used to adopt owl guidelines. (Sweet Home Chapter of Communities For Greater Oregon v. Turner, No 91-2218-NHJ (D.D.C.).

The court dismissed the case because FWS represented to the court that the guidelines had been rescinded and that they would not be enforced against the public. This rescission was reaffirmed in early 1992 when the Assistant Regional Director of the FWS submitted a sworn statement to the court saying that:

> "the service withdrew the guidelines from the timber industry, state and local governments, and the general public so that they would no longer use and rely on the guidelines."

The court declaration filed by the service also stated:

> "FWS has withdrawn the owl guidelines for external use. This was done because it appeared that certain entities, particularly state and local governments, had mistakenly viewed the guidelines as mandatory. Certainly, FWS uses the same biology as internal guidance but this cannot be equated with a continuation of external guidelines enforcement."

These statements to the court would seem to indicate that the guidelines were withdrawn except for use as internal guidance for federal guidance under Section 7 of the ESA. We have included a copy of a letter (Exhibit 1) from the law firm representing the plaintiffs in the Sweet Home case detailing how the Service has continued to use the rescinded guidelines.

Until federal agencies, particularly the FWS, rectify these problems and earn trust and credibility through their actions, efforts at developing incentives involving cooperative projects with the FWS will be viewed with skepticism by private landowners. For example, the FWS has made it clear that they want landowners to develop and submit Spotted Owl Habitat Conservation Plans (HCPs) for their approval. This process is inherently time consuming, costly and complex. Add to that the manner in which the FWS in this region has treated public and private officials and one can clearly understand why they need to establish credibility before expecting companies to initiate HCPs.

2. Economic Impact on Private Landowners.

Let me give you a flavor of the economic impact resulting from operationally restricting 2,500 to 4,000 acre blocks of commercial timber land for an owl or pair of owls. Currently, there are 636 owl territories impacting forest lands owned by the state of Washington and managed for the common school trust and lands owned by WFPA members. These circles overlap onto 600,000 acres of our members lands containing over five billion board feet of timber. Of this 600,000 acres, 250,000 acres containing three billion board feet have been operationally restricted by the FWS guidelines for the past three years.

The value of the timber varies by region and site productivity. However, it is estimated that the total equals billions of dollars. A single owl circle can tie up timberland valued at several million dollars, to $20 to $50 million and in at least one instance 100 million dollars. We have included in this letter the testimony of the Director of External Affairs for Weyerhaeuser Company's Washington State Division (Exhibit 2). This testimony was given to the Washington State Senate's Natural Resources Committee. It provides additional information on the cost and impacts of the guidelines on private landowners.

It would be a mistake to assume that these economic hardships are only an issue with industrial landowners. Non-industrial landowners are subject to the same restrictions and impacts and have even less flexibility than do landowners with substantial acreage. Several weeks ago, there was an article in the Seattle Post Intelligencer regarding the spotted owl issue. The article focused on the need to compensate landowners who are required to maintain owl habitat, a recognition that restricting management and harvest to the extreme is not the desired method to maintain or create new habitat.

The article cited the example of one non–industrial forest landowner who harvested a 170 acre tract of old growth near Fort Lewis. It quoted the landowner as saying that harvesting the trees "compared with burying my grandfather". But fear of restrictions the ESA and other regulations might have on his future ability to harvest led him to his decision.

I personally know this landowner. He exemplifies the best of forest management and stewardship. He personally manages his own land, does his own harvesting, replants, and experiments with various silvicultural techniques to improve his forest stands. This is his source of income. He is like most non–industrial forest landowners who choose to invest in forestry, rather than other more secure and liquid investments. His decision to harvest was based on a very real fear that the ESA as interpreted and administered by the FWS would deny him the ability to harvest his land and recoup his investment. Thus land that could have been managed for timber and owl habitat was lost. This is not an isolated case. Harvest of timber on non–industrial forest lands in Washington, has increased over 400% in the past ten years. Some of this is due to good markets. But some is due to landowner fears that, if they allow their timber to fully mature they will not be allowed to harvest it because the FWS then will consider it "suitable habitat" for spotted owls or other listed species.

The very nature of forestry requires that there be stability and predictability to rules and regulations. Investing in forestland is, by definition, a long term proposition, generally about 50 years in this region. After harvest the land must be planted, and may be sprayed to protect against insect and disease, precommercially thinned, and commercially thinned. Landowners large and small must combat vandalism, theft, and garbage dumping, as well as the risk of fire prior to harvest.

Whether one is a small non–industrial forest landowner or a large forest products company, decisions to invest and reinvest must be based on the ability to realize a return on that investment. The use of the rescinded owl guidelines has disrupted long–range forest management planning, reduced the amount of timber available for harvest, lead to premature harvest of some younger timber, and discouraged investment in forest land and forest management. These problems must be rectified if we are to encourage future investment and management of forestland and the development of cooperative projects aimed at increasing owl protection.

3. The 4(d) rule under the President's Option 9

One element of the Presidents proposed forest plan is the adoption of a 4(d) rule under the ESA. This section of the act allows the FWS to adopt special rules to protect threatened species. The FWS is currently in the process of proposing such a rule for the Spotted Owl.

[8]

Our concern is whether the rule will be constructed to provide a clear, concise and reasonable "safe harbor" from the current uncertainty regarding take. We believe such a rule should provide a "bright line" guidance to forest landowners that clearly defines when habitat modification would not be considered a violation of the ESA. Forest practices which are consistent with the guidance would not subject landowners to a threat of prosecution for take. This type of guidance would clearly set the parameters for landowners. Decisions to conduct forest practices inconsistent with the guidance could expose the landowners to possible investigation and prosecution but the harm would have to be proven.

Instead of this clear guidance, we are concerned that the FWS will adopt a rule that defines any action inconsistent with the guidance as an automatic ESA violation with the attendant severe penalties of the act imposed even though no harm occurred. This latter kind of rule would affect all landowners, not just those who own forest land. It would result in the federal regulation of local land use activities and paralyze state and local land use decision-making. It would also foster another round of costly and unnecessary litigation.

A 4(d) rule should make it clear to landowners what is not take, and at the same time, warn landowners that actions inconsistent with the guidance could lead to an inquiry to determine if take has occurred.

4. Impact on the Environment

Under Option 9 harvest levels on federal lands will be reduced by at least 75%. The plan anticipates that the shortfall will be made up by increased harvests on non-federal lands, (private, non-federal public and tribal lands). These lands cannot make up a shortfall in this magnitude.

Restricting supply from public and private lands in the Pacific Northwest will shift market share to other countries whose forest practices are less developed such as Chile, New Zealand, Australia, Pacific Rim countries and Russia. In addition to the serious economic consequences of losing market share, there will be serious environmental impacts. These countries have not developed the science of forestry as we have in the U.S. over the past hundred years. They do not practice forestry with the same rigor and adherence to environmental principles. As a result, sound forest practices will be the exception, rather than the rule.

As an example, the Center for International Trade in Forest Practices at the University of Washington estimates that in order to produce the same product volume, for every 100,000 acres of forest land harvested in the Pacific Northwest, 1.4 million acres of land would need to be harvested in the Russian Far East. Harvest levels of this magnitude in conjunction with only rudimentary environmental protection practices, will have significant impacts on soils, water quality and quantity, wildlife habitat, and air pollution.

A reduction in wood supply will have additional environmental consequences. Other material will be substituted for wood, e.g., steel, aluminum, and concrete. These non-renewable resources, which are produced with fossil fuels, will generate environmental impacts on their own. Studies have shown that producing a four-inch thick concrete slab will require 21 times more energy than a wood floor; steel studs require nine times more energy to produce than a wood stud; and aluminum siding requires five times more energy than wood siding. Synthetic materials such as plastic rely on oil and natural gas for over 98% of their raw materials; energy efficiency of wood constructed buildings surpasses buildings constructed with these non-renewal resources by such factors as eight for concrete, 413 for steel, and 2,000 for aluminum. We have enclosed a report (Exhibit 3) form the Western Wood Products Association which cites the independent research from the USDA, the National Academy of Science, and others who researched these figures.

The ESA and other environmental regulations may not only have negative social and economic impacts for our citizens, but also undesirable environmental impacts. These impacts are insidious and may not become apparent until irreversible damage has been done. The cost of repair where possible will take generations.

RECOMMENDATIONS:

1. **As a matter of public policy, there must be an acknowledgement that the conservation and recovery of the owl, and other species believed to be dependent on old growth and other older forests, is the responsibility of the federal government on federal lands.** Non-federal landowners are responsible for avoiding a take of a listed species. As long as federal agencies attempt to force conservation and recovery policies onto non-federal lands, and in particular private lands, they will foster an atmosphere of fear and uncertainty that will encourage landowners to harvest lands that could become habitat, and will discourage long-term investment in the forest products industry. The President's plan recognized this fact. Unfortunately, the FWS does not appear to agree.

2. **The 4(d) rule needs to provide a clear, concise and reasonable safe harbor that incorporates the new science on the owl that has evolved in the past three years.** It needs to define a safe harbor from prosecution for landowners who abide by it, and a warning of the risk of prosecution for those who do not. The alternative, supported by some in the agencies, is to write a rule that states any act inconsistent with it would automatically be a violation of the ESA. This in spite of the fact that actual harm has not been proven.

3. **A variety of economic and regulatory incentives need to be adopted.** You have received considerable testimony about the need for incentives. We would urge you to aggressively pursue two general types of incentives. These are: (1) Economic Incentives such as payments, subsidies, tax breaks, biodiversity bonds and trading for habitat development rights; and, (2) legislative changes to improve the ESA and remove the disadvantages and disincentives it creates for wildlife protection. There are a number of excellent proposals contained in H.R. 1490 which have been presented to you in testimony from the Endangered Species Coordinating Council and the American Forest and Paper Association.

I appreciate the opportunity to present this testimony to you on this vitally important issue. You have the opportunity to introduce balance to the ESA and achieve the purposes for which it was originally intended by the framers of the Act.

NOTE: Exhibits referred to are in Subcommittee files.

Reauthorization and Amendment of the Endangered Species Act

A Position of the Society of American Foresters

BACKGROUND

The Endangered Species Act (ESA) of 1973 (P.L. 93-295, as amended; 16 U.S.C. 1531-1543) is widely regarded as one of this nation's most important and powerful environmental laws. The ESA was enacted to provide a means of conserving ecosystems upon which endangered and threatened species depend, and a program to conserve such species, including those covered by various treaties and conventions.

Recent listings of species as threatened or endangered (T&E) have sharpened the debate on the goals, provisions, implementation and consequences of the Act. Two species in particular--the red-cockaded woodpecker in the South and the northern spotted owl in the Pacific northwest--have intensified the discussion, especially as they are affected by management of forest lands. The protection of both species has significant impact on forest management options on a regional scale.

BASIC PRINCIPLES

The following position is built on several principles that together serve the needs of species protection and preservation while working within the general beliefs upon which society is built. The Society of American Foresters believes:

* The conservation of species and ecosystems as provided for by the ESA is important to society and the profession of forestry.

* Management of the nation's forests should take into account the entire biotic community, especially species which are threatened or endangered.

**Adopted by the Council of the Society of American Foresters, on September 23, 1992, and will expire in one year unless after thorough review it is renewed by the Council.*

- Species conservation must operate within the context of our democratic society that depends upon and values private enterprise, and respects private property rights. As societal goals change, so do the related issues. Thus, laws will be enacted and modified over time to meet changing public values and expectations.

- The ESA must work in harmony with other laws (e.g., National Environmental Policy Act of 1969, National Forest Management Act of 1976, Federal Land Policy and Management Act of 1976) to maintain and support healthy forest ecosystems that can insure a range of resource benefits, both amenity and commodity. Therefore, conflicts surrounding the interpretation of these laws regarding species preservation should be recognized and reconciled.

- A comprehensive approach, using all environmental laws and trending toward broader ecosystem management, is needed to provide habitat protection for all species, not just those listed as threatened or endangered, thereby minimizing the need to list additional species.

- Institutions, and landowners, both public and private, should support the purpose and intent of the ESA. Cooperation, not confrontation, will offer the greatest potential for success.

- Public and private forest lands have a significant role and responsibility in the conservation of species and ecosystems. Pursuant to the 5th amendment to the U.S. Constitution, basic private property rights must be considered, valued, and protected where private lands are necessary to conserve a listed species or habitat.

- As U.S. and world populations continue to increase, there will be additional demands on forest lands to produce a range of outputs. Applying the ESA must consider human needs for both commodities and a healthy environment.

The Society of American Foresters makes the following recommendations for improving the current ESA and its application:

The Listing Process

Listing of species should continue to be based solely upon the best scientific and commercial data available, as currently stated in the ESA (Section 4b). The Secretaries of Interior and Commerce, may, on their own initiatives, propose to list species, and interested parties may petition for a listing but, in either case, neither the general public nor the biological sciences community of interests are involved in the process for purposes of comment until after a proposal to list is published in the Federal Register.

With respect to the scientific basis of a proposed listing, the broad interests of society must be provided for in a revised process which guarantees an objective and impartial application of science in determining the adequacy of biological information that supports proposals or petitions to list a species. Accordingly:

- Prior to a listing, a proposal to list should be referred to an independent Select Biological Committee (SBC) comprised of federal and state government, and private sector scientists who are not involved with federal agency listing activities.

- The SBC "peer group" would accept, hear, and review all information pertinent to a listing proposal and make a finding about the scientific adequacy of the proposal. If the Secretary's subsequent decision to list is inconsistent with the SBC finding, the Secretary must disclose the inconsistency, and explain to the public the reasons for proceeding with the listing.

- The SBC should also participate in developing or changing criteria and guidelines for listing any fish, wildlife, or plant below the species level. Modern scientific techniques such as electrophoresis, DNA analysis, or other state-of-the-art techniques should be employed where appropriate. The committee should also be involved in reviews of questions about speciation, subspeciation, and listing of populations.

The Recovery Plan Process

The recovery plan process is one of the most fundamental components of the ESA, and is initiated after a species is listed. Federal agencies have an affirmative responsibility to support the development and implementation of recovery plans, and to work towards recovery of listed species. A revised ESA should specify that recovery plans should address the physical and biological feasibility and consequences, economic efficiency, economic equity, social or cultural acceptability, and operational or administrative practicality of actions aimed at promoting the persistence and recovery of listed species.

Additionally:

- Recovery plans should contain clearly defined objectives and time frames that lead to measurable goals for recovery and ultimately delisting of the species.

- Critical habitat designation should become a key component of and emerge from the recovery plan process.

- The entire recovery plan process should be completed within twelve months following the listing of a species.

- To improve the efficiency and continuity of the recovery plan process, special recovery teams should be established around a core group of experienced recovery process planners and scientists. The core team would be augmented with the appropriate species specialists from within and outside the agency responsible for each individual recovery plan initiative.

- To gain the efficiencies that the shortened recovery plan process should yield, society must accept the fact that plans will be "living documents" that will change as additional data becomes available. Initial plans should acknowledge key information needs and provide for research, inventories, monitoring, and specified timelines to fill information gaps.

- Recovery plans should include alternative options for achieving recovery, with associated risk analysis to assess the likelihood (high, medium, or low) for success of these options. Whenever possible, the alternative that achieves recovery with the least adverse socioeconomic impact should be selected.

- The agency responsible for recovery initiatives should develop a set of criteria and guidelines for establishing a species recovery prioritization process that, among other things, recognizes actual and potential ESA program funding levels and limitations, societal values and priorities, and chances for recovery success.

- While recovery plans focus on public lands, a program to stimulate government/private partnerships should be developed and implemented where private lands are critical to the recovery effort. An option to include in such programs should be provision to relocate listed species from private to public lands where feasible.

- Because the knowledge base for many situations is currently inadequate, a statutory requirement to list multi-species and "endangered ecosystems" would be premature at this time. Rather, the recovery plan process should be stimulated to evolve steadily over the long term toward multi-species management plans that focus on ecosystems and ecological communities.

Private Lands--Roles and Responsibilities

Seventy-two percent of American's commercial forests are in private ownership. These private lands play an important role in the protection of biotic communities. The principle of private ownership of land is based both upon English common law and the 5th amendment to the U.S. Constitution. Private ownership thus carries with it a commensurate stewardship responsibility. A revised ESA should encourage willing stewardship through incentive programs designed for various land use and management activities. The revised ESA, and the implementation of its principles, should recognize the following:

- Private landowners who cede control of their lands to society in the name of preserving threatened or endangered species should receive just compensation.

- Species recovery on private lands is a public responsibility. Private landowner roles concerning avoidance of "take", as defined in the ESA, must be clearly stated in federal law.

- Applicants for an "incidental take" permit are expected to file an associated Habitat Conservation Plan (HCP), which, for many landowners, could be prohibitively expensive. A new, more workable process should be substituted for the current HCP process. A phased approach, as outlined below, would address those landowners whose lands are essential to the conservation of a listed species, but who are unable to bear the costs.

  Phase 1: Upon determination that a listed species occurs on private ownership, the agencies involved should, where the lands and species are essential to the conservation of the listed species, immediately seek to work with landowners and/or managers to develop a voluntary cooperative management plan that meets the species' needs for protection and landowner objectives. The plan should result in a documented finding of "no take" or "no jeopardy". Generally, the process should be completed within twelve months.

Phase 2: When steps to produce voluntary plans do not prove successful, and where material interests in the property are necessary to meet species protection goals, the responsible agency should seek to purchase a conservation easement covering the interests needed. Generally, Phase 2 should be completed within 2 years of the start of Phase 1 initiatives.

Phase 3: If neither Phase 1 or 2 prove successful, the responsible agency should seek either (1) to exchange public lands acceptable to the landowner, or (2) be prepared as courts may direct to justly compensate the owner. If an exchange is not acceptable, the agency should seek to acquire the affected property at a value at least as great as it would be without the presence of the listed species. Generally, Phase 3 should be completed within 3 years of the start of Phase 1 initiatives.

As an alternative to a judicial determination of easement value (Phase 2) or compensation for a taking (Phase 3), a "Market Values Board" should be considered to settle taking and values disputes that may arise. This approach should not be construed as making "compensation for a taking" an agency responsibility without a legal finding under current law that compensation for the taking is due. Rather, SAF proposes the alternative as a "willing buyer - willing seller" scenario within which to resolve administratively taking compensation cases quickly and fairly. If the result is not successful, landowner claims that compensation is due for a taking of property shall be addressed in the courts under existing law.

* If the responsible agency determines that management plans or acquisition of interests are not necessary, a landowner's responsibilities under the ESA should be considered terminated.

* Surveys or other practices to determine the presence of a listed species are a wildlife agency's (state or federal) responsibility. Landowners should grant rights of ingress, and be encouraged to cooperate voluntarily, but not be expected to bear the cost.

* Funding realities mandate establishing priorities for recovery of a species. Populations or individuals of a listed species outside of targeted recovery populations and /or critical habitats, and not part of the Phase 1 cooperative planning process, should not be subject to ESA restrictions.

* It is a federal responsibility to ensure landowner compliance with the ESA. If a landowner is thought to be in violation of the Act, citizen suit provisions under section 11(g) of the ESA should be limited to actions against the appropriate federal agencies.

The Endangered Species Committee

The make up of the current Endangered Species Committee ("God Squad") guarantees its impracticality and unworkability. Its federal members (Cabinet and near-Cabinet level - ESA, Section 7(e)(3)) are seldom personally involved in ESA tasks at hand or routinely familiar with the knowledgeable natural resource and social science professionals from other federal departments. issues at stake. Except for the Secretary of the Interior (one of the six federal members) who chairs the ESA, the federal members should be replaced. In their stead should be appointed high-level and The Secretary of the Interior, as under the current ESA composition, would be accountable for ESA exemption decisions.

About The Society

The Society of American Foresters, with about 18,000 members, is the national organization representing all segments of the forestry profession of the United States including public and private practitioners, researchers, administrators, educators, and forestry students. The Society was established in 1900 to advance the science, technology, education, and practices of professional forestry in American and to use the knowledge and skills of the profession to benefit society. SAF is the accreditation authority for professional forestry education in the United States.

AMERICAN
FOREST &
PAPER
ASSOCIATION

October 26, 1993

Ms Mary Kitsos
Chief Clerk
House Merchant Marine and
Fisheries Committee
1334 Longworth House Office Bldg.
Washington, D.C. 20515-6230

Dear Ms Kitsos:

Please find enclosed five copies of testimony on behalf of the American Forest & Paper Association which we are submitting for the October 13, 1993 hearing record on "The Endangered Species Act: Incentives for Private Landowners to Conserve Listed Species" hearing (Subcommittee on Environment and Natural Resources).

If you have any questions or need additional information, please let us know. Thank you.

Sincerely,

Jane L.

Jane L. Turner
Director
Legislative Affairs

Enclosures

1250 Connecticut Avenue NW, Second Floor, Washington, DC 20036
Phone: 202-463-2700 Fax: 202-463-2785

AMERICAN FOREST & PAPER ASSOCIATION

STATEMENT

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

COMMITTEE ON MERCHANT MARINE AND FISHERIES

UNITED STATES HOUSE OF REPRESENTATIVES

OCTOBER 13, 1993

The American Forest & Paper Association (AFPA) is pleased to present written testimony before the Subcommittee on Environment and Natural Resources of the Committee on Merchant Marine and Fisheries concerning proposals to provide economic incentives to preserve habitat for species listed under the Endangered Species Act.

The AFPA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. AFPA represents approximately 550 member companies and related trade associations (whose members number in the thousands) which grow, harvest, and process wood and wood fiber and produce solid wood products. AFPA represents a vital national industry which accounts for over 7 percent of total United States manufacturing output and 90 percent of domestic recycled paper manufacturing capacity. The AFPA is also member of the Endangered Species Coordinating Council which has endorsed H.R. 1490.

An abundant timber base is critical to the maintenance of a vital forest products industry. An abundant timber base requires forests of all kinds which in turn provides the range of habitats needed by forest species, both listed and others. An equitable, well-reasoned tax policy can satisfy both industrial and wildlife purposes.

Habitat needs of listed species, as well as other wildlife, are varied. However, the forest habitat - in all its successional stages - provides a significant component of the North American biologic regime. Historically, the forest contained a variety of habitat types. Although none of the immigrant peoples found a vast expanse of old growth forest upon arriving in North America, they did find more forest then we have today. We obviously cannot return a nation of over 200 million people to the condition it was in 20,000, 1,000, or even 200 years ago. We can however adopt policies and laws which encourage the development of a balanced, full spectrum of forest age classes.

The Committee is concerned with specialized habitats for listed species. We submit that you should first focus on creating and maintaining maximum diversity of forest habitats. If this does not satisfy the needs of all listed species, then provide the more particularized incentives, tax or otherwise, to encourage land management for these unique needs.

For commercial timberland owners--both individual and corporate--the primary tax-related goal remains the promotion of tax policies which encourage the planting, growth and maintenance of a sustainable and renewable forest resource. Capital gains taxes, which now stand at an historically high level in relation to the regular income tax rates place a heavy economic burden on tree growers.

The Tax Reform Act of 1986 eliminated the existing differential for capital gains, creating an economic hardship for timber growers. While the lower regular rates of tax reform have proven beneficial, the loss of a capital gains differential is having an adverse effect on an already economically fragile resource. Without a capital gains differential, the already constrained timber resource will not attract sufficient capital to keep up with the increasing demand.

Timber growing requires heavy front-end expenditures, long-term carrying charges, high risks of weather, disease, insects and fire -- all uninsurable. Rates of return are historically low compared to alternative investments, with capital literally locked in the ground during the growing cycle. Timber growing does not enjoy market liquidity as trees cannot normally be economically harvested before maturity.

America's forests are the most productive forest lands in the world because of the huge timber growing investments that have been made to increase productivity. Without a capital gains differential, investments in growing long-rotation timber are declining. For every year that there is inadequate reforestation and less effective timber management, that year's lost planting is lost forever -- a tree cannot be planted retroactively. It takes 30 to 75 years to grow timber used in the manufacture of lumber and plywood, and 15 to 30 years to grow timber used for pulpwood. That is why federal tax treatment for timber growing is particularly important for forest landowners who furnish the nation's timber resource.

Our professionally managed forests provide vital wildlife enhancement, water quality, a hedge for soil erosion, provide for recreational needs and create aesthetic beauty. Reforestation may also play a critical role to combat the so-called "greenhouse effect."

American forestry is, overall, the most environmentally sound forest management in the world. Landowners are committed to sound environmental stewardship of our forest land. Congress should cultivate this fact. But without the corresponding fair economic environment necessary to grow trees over the long run, represented in part by capital gains, the potential for deterioration in those management practices increases.

The consequences of the decreased flow of capital investment in timber is likely to mean that lands currently owned will be less well managed, forest research will decline, pressure will mount to harvest forests prior to economic maturity, and planting activity will decrease. Marginal, and perhaps not-so-marginal, timberland will be replaced with annual agricultural crops or real estate developments.

In addition to the obvious economic consequences for workers and rural communities as well as higher lumber and paper prices, the habitat base for forest species will be decreased. This in turn will lead to less habitat available for species at risk.

Forest landowners -- from large industrial to small private -- are located in nearly every section of the nation. They are almost seven million strong and own 350 million acres of woodlands, encompassing more than 72 percent of all commercial forests. Original investment decisions by those landowners were based on the capital gains treatment of their income. In 1986, the rug was pulled out unexpectedly for many timber growers ready to harvest, imposing a higher tax at ordinary rates -- and without the possibility of averaging their income even though economic circumstances forced them to receive, in some cases, a lifetime's gain on their timber in one year. Now, many landowners are rethinking plans to reforest which could cause severe shortages in the future.

Reinstating a significant capital gains differential, and reestablishing its application to timber for both individuals and corporations, is essential if timber growers are to meet future raw material demands for the thousands of consumer products dependent on wood and fiber.

Legislation which is vitally important to tree growers throughout the nation, H.R. 960, the Reforestation Tax Act of 1993 (the "RTA") is endorsed by the thirty-two organizations listed on the attached page, including the Natural Resources Defense Council and the Wilderness Society.

Congress long ago saw the need to provide fair and equitable taxation to those who had the enterprise and vision to invest in the long-term potential, but inherently uncertain, gains from timber growing. We must create a self-sustaining resource of trees to ensure raw materials for timber workers' jobs as well as provide a continuing supply of reasonably affordable building materials for consumers. It is increasingly obvious that our most reliable source could be the millions of acres of privately owned forest lands.

The RTA introduced on February 19, 1993, will create reasonable tax incentives to increase reforestation and enhance timber management on private land. The legislation currently has 37 co-sponsors. A summary of this bill is included at the end of this statement.

This bill is a key element in maintaining private forest land in a productive posture. Fair tax treatment will help insure that timber growers do not convert their lands to other, non-forest uses.

We commend Congressmen Mike Kopetski (D-OR) and Ron Wyden (D-OR) for developing and introducing this very important piece of legislation, the Reforestation Tax Act of 1993, and for their efforts in championing the cause of tree farmers throughout the nation.

The RTA is supported by all private forestland owners. The RTA provides substantial incentives for private landowners to engage in a variety of reforestation efforts. These efforts cannot help but to promote a sound environment and a healthy forest.

We also commend the various organizations and individuals who prepared white papers suggesting other possible economic incentives to preserve endangered species habitat on private lands. These papers include proposals to provide federal tax credits for State and local property taxes where the property is used for habitat maintenance, tax credits for habitat improvement, partial tax credits for ESA compliance expenditures, and income tax deductions for revenue earned from lands managed to support endangered species.

While these proposals certainly deserve consideration, they also require a considerable amount of additional study. Conditions may be attached to these proposals which are far too restrictive to encourage private landowners to take advantage of them.

Other proposed incentives include various methods for payments to landowners and various schemes to create tradable conservation credits. We are generally supportive of direct and indirect funding to encourage habitat conservation and management. We are obviously concerned that the source for this funding be reliable and long-term. We encourage the Committee to blend the various funding proposals it will receive with the provisions of H.R. 1490.

The various conservation credit schemes strike us as far too complicated to be workable. Moreover, the habitat needs of listed species are so varied, and in some cases will be so urgent, that tradable credits will be unusable. We urge the Committee to give careful study, and to obtain a wide range of comments, before including such a scheme in legislation.

THE REFORESTATION TAX ACT OF 1993 (H.R. 960)

The major provisions of the RTA as originally introduced are:

1. PARTIAL INFLATION ADJUSTMENT:

Upon the sale of timber, for purposes of determining Section 631 gain, the gain would be reduced by three percent for every year the timber was held. This provision is restricted so that the reduction in stumpage value cannot reduce the gain by more than 50 percent. While this provision would not compensate fully for the negative tax impact of inflation, it would provide a significant incentive for those tree farmers who hold their investment for a long period of time.

2. PASSIVE LOSS RULES:

This provision clarifies when individual owners, or principals in partnerships, would be able to deduct normal operating expenses pertaining to management of their treelots. This would be achieved through a new set of "material participation" criteria correcting what we believe to be an unintended result of the 1986 reforms. This provision was included in H.R. 11 which passed both Houses of Congress last year.

3. REFORESTATION TAX CREDIT:

This provision simply updates existing laws by doubling the expenditure limit from $10,000 to $20,000 and indexing this amount for inflation.

4. REFORESTATION AMORTIZATION:

This provision also updates existing law by doubling the limit to $20,000, indexing it to inflation and reducing the seven-year amortization period to five years.

LIST OF COSPONSORING ORGANIZATIONS FOR RTA

American Forest and Paper Association
Forest Industries Council on Taxation
Forest Farmers Association
Southern Forest Products Association
Southeastern Lumber Manufacturers Association
Maine Forest Products Council
Small Woodland Owners Association of Maine
Arkansas Forestry Association
Southern State Foresters
Georgia Forestry Association
Louisiana Forestry Association
North Carolina Forestry Association
South Carolina Forestry Association
Mississippi Forestry Association
Texas Forestry Association
Virginia Forestry Association
American Pulpwood Association
National Association of State Foresters
Hardwood Manufacturing Association
National Hardwood Lumber Association
Hardwood Research Council
Hardwood Forest Foundation
Alabama Forestry Commission
Stewards of Family Farms, Ranches and Forests
The Wilderness Society
The National Woodland Owners Association
The Oregon Small Woodlands Association
The Washington Farm Forestry Association
1,000 Friends of Oregon
The Idaho Forest Owners Association
The Forest Landowners of California
The Natural Resources Defense Council

Total: 32

RTAorgs June 22, 1993

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Gerry E. Studds
Chairman
Committee on Merchant Marine And Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of March 31, 1993, requesting the Department's views on H.R. 1388, the "Just Compensation Act of 1993," which is pending before the Committee on Merchant Marine and Fisheries. We are grateful for the opportunity to share the Department's views with you regarding this proposed legislation.

The bill would require federal agencies to compensate owners of private property "for any diminution in value" caused by any action under the Endangered Species Act of 1973, section 404 of the Federal Water Pollution Control Act, the Surface Mining Control and Reclamation Act of 1977, and subsections (c), (d), (e), and (f) of section 9 of the National Trails System Act. Compensation would be required even where the government action at issue results in less than a complete deprivation of use or value, and where the action is temporary. The bill would require compensation even where the government action at issue does not constitute a compensable taking under the Fifth Amendment.

The bill directs the appropriate agency head to make an offer of compensation to the property owner within 60 days of an action that results in any compensable diminution. The offer would remain in effect for one year. The owner could either accept the offer, or reject it and bring a claim for compensation in the United States Claims Court (recently renamed the United States Court of Federal Claims). In addition to awarding fair market value for the property affected, the court could award reasonable attorney's fees and litigation expenses.

The Department of Justice strongly opposes this proposed legislation for several reasons. First, it is unnecessary. The stated purpose of the bill is to reduce undue burdens on the public from government actions that affect private property. Yet the Just Compensation Clause of the Fifth Amendment to the Constitution already provides an adequate remedy -- just compensation -- where government action unduly burdens private property. As you know, the Founders were keenly interested in the protection of property rights, and the purpose of the Just Compensation Clause is to ensure that property owners are protected against undue government interference with such rights. The efficacy and adequacy of this constitutional remedy is evidenced by myriad judicial decisions holding that various regulatory actions -- including actions under the provisions addressed by H.R. 1388 -- might give rise to constitutionally compensable takings. Such cases provide compelling evidence that the Just Compensation Clause is a fully effective means by which private property owners may seek redress if federal regulation effects a taking. Any legislative effort to supplement the constitutional remedy established by the Founders is, in our view, unwarranted.

More importantly, H.R. 1388, particularly the requirement to compensate any diminution (regardless of significance), would radically transform existing compensation obligations in a manner that would inevitably undermine the federal government's ability to protect public health and the environment, and to carry out other mandates, under the four listed statutory programs. Under long-established takings jurisprudence, the question whether a regulatory action gives rise to a compensable taking generally entails a highly fact-sensitive inquiry. The Supreme Court has "eschewed the development of any set formula * * *." Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224 (1986). Instead, "the question necessarily requires a weighing of private and public interests." Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980). Three factors are of particular significance to the analysis: (1) the economic impact of the government action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). This multifaceted analysis reflects the wide range of governmental actions and resulting impacts on private property that might give rise to a takings issue.[1]

H.R. 1388 would encircle the Supreme Court's flexible, fact-specific analysis for these four statutory programs with a single, rigid statutory inquiry as to whether any diminution of value has occurred. Regulatory actions under these programs necessarily affect a broad range of property interests in varying degrees. To require compensation for any diminution in value -- however small, incidental, or attenuated -- without regard to the factors traditionally weighed by the courts under the constitutional analysis, would seriously undermine the ability of the Executive Branch to carry out its mandates under these programs. As stated by Justice Holmes in the landmark case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922): "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law."

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[1] The Supreme Court has advised that this fact-sensitive inquiry for regulatory takings is unnecessary only in very limited situations, such as where the regulation compels an owner to suffer a permanent physical occupation of the property (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)), or where regulation denies the owner all economically productive use of the property (Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)).

The bill's statutory standard also ignores the wisdom of appropriate valuation techniques developed by the courts over the years in takings case law. Fair market value is an appropriate measure in many cases. However, this rule -- unlike the bill's proposal -- is flexible. The constitutional standard for appropriate compensation is governed by basic equitable principles of fairness, which do not always coincide with fair market value.[2] Nor does the bill recognize that government regulation, even regulation that diminishes value, might confer benefits on the property owner that mitigate, or even outweigh, any loss in value.

Moreover, the bill unwisely foists responsibility for determining appropriate compensation in the first instance on Agency heads, who are ill-equipped to make such decisions. Responsibility for deciding compensation issues in takings litigation currently rests in the federal courts, particularly the United States Court of Federal Claims, which has developed broad and deep expertise in the area.

Finally, the bill's creation of a statutory right of action in the United States Court of Federal Claims for any diminution of value would severely encumber the already overburdened federal docket, thereby further delaying the resolution of claims under the Just Compensation Clause.

In short, we view the bill as unnecessary and unwise, and we respectfully recommend that it not be passed. Again, the Department appreciates the opportunity to express its views on H.R. 1388. We hope that this analysis assists the Committee in its consideration of the bill.

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[2] See United States v. Fuller, 409 U.S. 488 (1973) (just compensation for property taken through condemnation does not include value created by government's grant of a permit to graze animals on adjoining federal land).

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

6054 50th Ave. N.E.
Seattle, WA 98115
November 8, 1993

Committee on Merchant Marine and Fisheries
1334 Longworth House Office Building
U.S. Congress
Washington, D.C. 20515

Mr. Chairman and Committee Members,

On October 13, 1993 your committee held hearings on the conservation of endangered species and habitat on private land. I appreciate your taking additional comments on that important subject.

As a private non-industrial ("small landowner") in Washington, and as immediate past president of Washington Farm Forestry Association, the small landowner's organization, I would like to express our viewpoint. We share many of the concerns of the industrial landowners, from whom you received testimony. However we have smaller holdings and different management objectives, and in Washington State we also own almost half the privately held forest land.

Therefore our land management objectives are critical to the succcess of any species or habitat conservation efforts on private land. Those objectives vary by ownership from a sustained yield crop of trees to pure aesthetics. Whatever those objectives, under the current regulations, harboring a rare, threatened, or endangered species on our land is a formula for disaster. It can easily result in the loss of the land, or its sale for conversion. Therefore we see incentives as the only sure way to maximize the conservation of species and habitat.

We also think that it is the least expensive way. Under the system of penalties now in place, landowners are well advised not to report any rare species resident on their land--even if the landowner has tried to attract it. How much more gratifying to be able to brag, observe, and tempt a rare species to take up residence! Scientists would benefit from having their preliminary work done. They could put scarce money into detailed research. If the National Biological Survey is to be carried out, it would reduce costs to have people come forward with catalogs of species on their own land, to be checked by experts where necessary.

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Possible incentives include:
--Rewarding the documented nurturing of a T&E species, through maintenance of habitat, food source, etc., in a way that encourages the deliberate harboring a T&E species.
--Waiving certain taxes as long as the species is documented on the land.
--Speeding up or waiving habitat conservation plans, especially for harvests of 40 acres or less. Currently an HCP for seven acres has been waiting for approval for over two years. The 84-year-old owner may not outlive the process. In demanding the Estate Tax if she dies, the IRS may not be so patient.
--For tree farmers participating in a government-sponsored Stewardship program, foregoing conservation plans.
--Purchasing easements as a method of compensation.
--For taxation purposes, allowing a "super credit" for the treatment of capital gain or for expenses of maintaining (government) desired species on the land.
--Creating a bonus for documented rearing and DISPERSAL of a species onto adjoining lands.
--Restoring confidence in the system.

Restore confidence by:
--Recognizing that most small forestland owners are environmentalists who welcome fish and wildlife projects.
--Recognizing that the tree farm is an investment, usually a retirement fund, from which some revenue must be generated in a timely manner.
--Creating flexibility in the regulations.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Jean Bolton

Jean Bolton
Tree Farmer
Past President, WFFA

MARSHALL T. HUNTTING
GEOLOGY AND MINERAL RESOURCE CONSULTANT
282 HUNTTING ROAD
SILVER CREEK, WA 98585

(206) 985-2382

November 9, 1993

Congressman Studds, Chairman
House Merchant Marine and Fisheries Committee
and committee members

Mr. Chairman, thank you for the opportunity to comment on the important issues regarding protection of endangered species under the Endangered Species Act.

I am a 75-year resident of Lewis County, Washington, a county that has been very seriously negatively impacted by application of severe regulatory restrictions (without compensation to the victims) for the bennefit of the spotted owl, the bald eagle, and the marbled murilet under the Endangered Species Act of 1973.

I understand that at the October 13 hearing you solicted proposals to establish incentives for the conservation of private land for the bennefit of endangered and threatened species, and I congratulate you for your interest in this matter. I agree that incentives are "the way to go" to accomplish the objectives of the Act.

To be as briefand to-the-point as possible, I strongly recommend the provisions of HR 1490, the Tauzin-Fields bill, specifically sec. 306 (Compensating property owners for substantially reduced value), sec. 401 (Habitat conservation programs), and sec. 402 (Habitat reserve grants).

Many other sections of HR 1490 provide important improvements over the Endangered Species Act of 1973 that I do not find in any other proposed legislation, and I fully support that bill.

Northwest
Legal
Foundation

A PUBLIC INTEREST LAW FIRM

November 8, 1993

Ms. Mary Kitsos, Chief Clerk
Committee on Merchant Marine and Fisheries
U.S. Congress
1334 Longworth House Office Building
Washington, D.C. 20515

Subject: October 13, 1993 Hearing - Endangered Species Act

Dear Mr. Chairman and Committee Members:

Thank you for the opportunity to present the views of the Northwest Legal Foundation. The NLF has over 600 members and is dedicated to promoting civil rights associated with the ownership and use of private property.

It is our belief that when individuals are required to house and nourish animals or plants for the benefit or society in general, that society should bear the cost of those benefits. We request that Congress make clear to agencies that a procedure is necessary for the agencies to follow to compensate property owners in every case where an endangered species gets use rights to property. While this may require the government to be more selective in which species it protects, such prudence is necessary where individual rights are otherwise jeopardized or violated.

When a common measure (money) is applied to securing land for species other than man, the results will be fairer to everyone. The most worthwhile species will be protected and the rats and slugs may join the thousands of other species that have naturally disappeared.

Please make sure the compensation paid to property owners is the fair market value of the property lost or diverted to public use.

Thank you again for your thoughtful consideration of this issue.

Very truly yours,

Jeanette Burrage

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